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OF THE

LAW OF INTESTATE SUCCESSION IN SCOTLAND,

WITH A BRIEF OUTLINE OF THE

LAW OF INTESTATE SUCCESSION IN ENGLAND:

COMPREHENDING

TABLES SHOWING, IN PARALLEL COLUMNS, THE MODES IN WHICH PERSONAL ESTATE IS DIVISIBLE UNDER AN INTESTACY IN BOTH KINGDOMS;

AS ALSO

AN EPITOME OF THE LAW IN RELATION TO THE IMPOSITION, COLLECTION, AND SETTLEMENT OF THE LEGACY AND SUCCESSION DUTIES,

WITH THE

VARIOUS FORMS APPLICABLE TO THE SETTLEMENT OF THESE DUTIES, TO THE ADMINISTRATION OF PERSONAL ESTATES BY EXECUTORS-DATIVE, AND TO THE SERVICE OF HEIRS TO HERITABLE ESTATES,

HAVING APPENDED

THE RELATIVE STATUTES, ANNOTATED WITH REFERENCE TO THE TEXT.

BY

P. H. CAMERON, S.S.C., EDINBURGH,
AUTHOR OF "SUMMARY OF THE LAW OF JOINT-STOCK COMPANIES."

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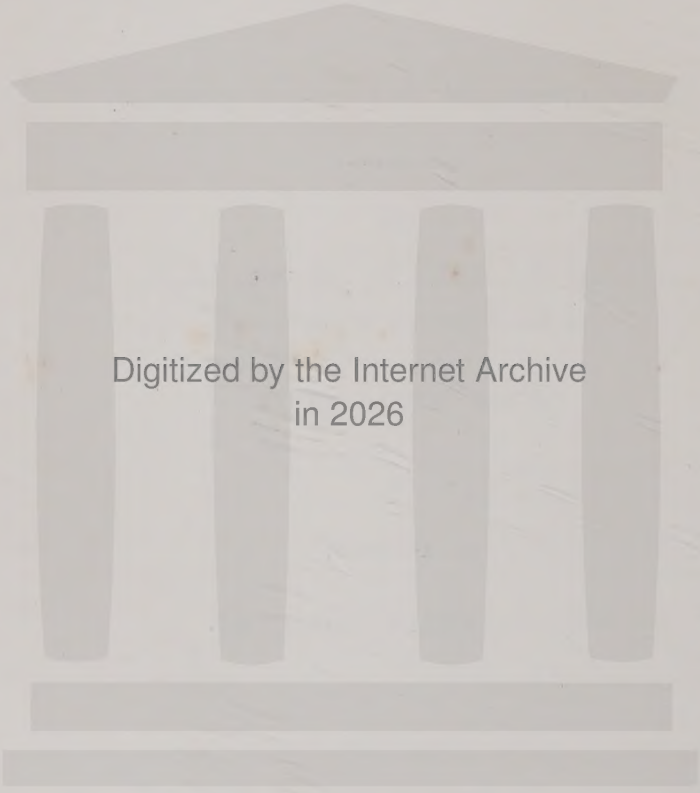

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PREFACE.

ALTHOUGH nominally a Second Edition, this work is new in the main, having been nearly all rewritten and greatly enlarged.

The First Edition, written when I was a student of law, was not prepared with a view to publication. It owed its appearance in print to the publishers. Being now out of print, I have been led, although not without some misgivings on account of the limited time at my disposal, to undertake the preparation of the present compilation, which I doubt not will be found of more practical utility than the former.

Like the former work, however, the present does not claim to be considered as presenting a complete view of the principles and practice of the Law of Intestate Succession. It is intended rather to serve as an introduction to larger and more comprehensive works; in short, to furnish an outline of the general principles and axioms of the law, arranged in a simple and practical manner, divested of legal technicalities and disquisitions, subtle distinctions and multitudinous details, which not infrequently prove more embarrassing than useful to those who desire to refresh their memory with the least possible expenditure of time and labour.

Whilst thus desiring to confine the work as much as possible to a statement of the general principles of the law, I have felt that these principles could not be rightly understood without some knowledge of their history and development. I have, therefore, set forth, in the beginning of the work, the rules of law as laid down in the leading institutional works, from the "Regiam Majestatem" to "Bell's Principles," and have appended footnotes showing the alterations that have been made on the law since the

publication of these works. In this way I have, for example, been able to indicate concisely the radical changes introduced by the Married Women's Property Act of 1881, and the other prior Acts dealing with the property of married women—changes which render it now extremely difficult, without a great deal of study, to master their full effect on the law as laid down by the institutional writers. It is to be hoped that this part of the work, which also shows the gradual progress of the law from early times, will be found useful, as exhibiting at once the former law and the changes introduced by time and Statute.

A new feature has been introduced in the present work which is somewhat of a novelty in Scottish law books. The intimate business relationships which now subsist between England and Scotland have suggested the idea of including in the table showing the legal distribution in personal estate, parallel columns to exhibit the English as well as the Scottish law. By this means the differences between the two laws, in all the cases and circumstances which most frequently arise in practice, can be seen at a glance. And with a view to greater utility, I have added brief outlines of the present rules in relation to legal succession in both real and personal estate in England. The proof-sheets of this part of the work were kindly revised by Archibald Brown, Esq., of the Middle Temple, London, Barrister-at-Law, Editor of "Scriven on the Law of Copyholds and Manors," and of some other standard works on English law, and joint Editor of the last (or Ninth) Edition of "Stephen's Commentaries on the Law of England."

To the present Edition I have also added an epitome of the rules affecting the imposition, collection, and settlement of legacy and succession duties, together with the principal forms required in practice. This part of the work will, it is hoped, meet a want at present much felt. The existing law as to legacy and succession duties is contained in lengthy Statutes, parts of which are repealed and parts amended in a way calculated to bewilder the student, and to render the mastery of the subject very difficult without a considerable expenditure of time and patience. I have endeavoured

to meet this difficulty by bringing within a narrow compass the information necessary to enable any one, save under exceptional circumstances, to settle these duties in compliance with the requirements of the Commissioners of Inland Revenue, with comparatively little trouble.

All the Statutes bearing on the context have been inserted in the end of the work, with footnotes illustrating the operation of particular passages, and showing the parts amended and repealed.

I have gratefully to acknowledge the kind services of George Watt, Esq., Advocate, and of James Caldwell, Esq., Campsie, in revising the sheets as they passed through the press. The Index has been prepared with great care by Mr. Norman Macleod.

COLINSWELL, BURNTISLAND,
December, 1883.

PREFACE TO THE FIRST EDITION.

THE object of the following pages is to present, in a popular and inexpensive form, a brief summary of the Law of Intestate Succession in Scotland.

Although by no means designed as an exhaustive epitome of the law, I entertain a hope that this summary may be of some assistance to the legal practitioner as a convenient handbook on those questions which most frequently arise, and afford facility of reference to books treating of the law in detail.

To persons outside the legal profession, who have not easy access to the books treating of this great social and important subject, I venture to hope this summary of the law will be found useful. It will show them the leading features of the law arranged under distinctive heads, while by means of the tables the operation of the law in the absence of a will or settlement may be easily ascertained.

The Statutes and Forms in the Appendix are intended to illustrate the body of the work, and make it more practical for those who consult it.

I did not originally intend this summary for publication, having written it for my own use in the shape of memoranda, collected in the course of my reading, and now arranged in its present form. I must, therefore, crave indulgence for any want of completeness it may present.

P. H. C.

St. Swithin's Lane, E.C.,
April, 1870.

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SUMMARY

OF THE

LAW OF INTESTATE SUCCESSION IN SCOTLAND.

GENERAL SURVEY OF THE LAW.

1. Early History.—The early history of the Law of Intestate Succession in Scotland is involved in obscurity. Attempts to trace it have been made at various times by several jurists of eminence, but all have formed conflicting opinions. Generally, however, the researches of these jurists tend to show that at first intestate succession in Scotland was governed by considerations of equity and expediency, having regard to the state of society and civilisation, and varying from time to time; that, by-and-by, a custom sprang up, which gradually ripened into fixed rules; and that these rules, again, formed the groundwork of enactments or regulations of the Scottish Parliament, and became assimilated with other rules borrowed from the Roman, Canon, and Feudal Laws.(*a*)

This, at least, may be said of intestate succession in heritable estate. As regards personal estate, there can be no doubt that, for a long time anterior to the era of the Reformation, the Canon Law(*b*) furnished the rule of distribution, and was administered by the prelates of the Roman Catholic Church, who, it

(*a*) Stair, 1, 1, 15 *et seq.*; Ersk. 1, 1, 27 *et seq.* See also Fergusson's "Consistorial Law;" the Register of the Privy Council of Scotland, of which five volumes already printed, commencing with the year 1545, and brought down (1882) to 1599; the printed Register of the Great Seal of Scotland, beginning with the year 1424 and continued to 1513; also the printed Calendar of Documents relating to Scotland, preserved in London, beginning with the year 1108 and brought down (1881) to 1272.

(*b*) The Canon Law consists of the *decretum*, a collection of Church laws made in the twelfth century in imitation of the Roman Pandects, and of the *decretalia*, collected from the Epistles of the Popes.—Stair, 1, 1, 14.

seems, gradually assumed, without ever having been invested by legislative authority, the prerogative of naming officials or commissaries within their several provinces or dioceses.

Brief notices of the Law of Succession are to be found in the Scottish Chronicles, and in the Records of Proceedings, and fragments of Acts of the Scottish Parliament which commence with the twelfth century, but from various causes, these cannot now be accepted as authentic. The earliest authentic notices are contained in the older editions of the Scottish Acts, which begin in 1424, in the reign of James I. These notices are very scanty; but this is not surprising in view of the manner in which justice was administered in Scotland for ages previous to the Reformation.

All Scottish Acts now derive their authority as law, not so much from the circumstance of their having been made or passed by the Scottish Parliament, as from their having been brought down to our time by an uninterrupted train of practice.

It is to this train of practice, therefore, we must now mainly look in an attempt briefly to present the law which has culminated in our present system. Not much is to be learned from our Statute Book; two short enactments embrace the product of nearly three centuries.

Regiam Majestatem.

2. Earliest Legal Digest.—The earliest work(*c*) which professes to give a comprehensive digest of the Law of Scotland is the "Regiam Majestatem; or, Books of the Majesty." It is in four parts; and to the English translation published in 1774, there are appended the "Quoniam Attachiamenta; or, The Baron Laws;" the "Form and Manner of the Baron Court;" the "Laws and Constitutions of Burghs;" and a collection of various statutes and forms of process. It bears to embody the "Auld Laws and Constitutions of Scotland, from the days of King Malcolm the Second until the time of King James the First." It is believed to have been compiled in the reign of King David I. But eminent jurists are not agreed as to this. Some assign it to an earlier period. This, however, seems to be a mistake, as it refers to the civil law;

(*c*) On the early history of the law of succession in other countries, see Maine's "Ancient Law," 1861; also Bar's "International Law," 1883. For an epitome of the succession laws of Christian countries, see Eyre Lloyd's Manual, 1877.

and it is well known that the civil law, after being buried in oblivion for ages, was not restored until a copy of the Pandects or Digest of Justinian was found in Italy in 1127.(*d*) That Digest was not taught at Oxford until 1150, and it must have been some time after this when it found its way into Scotland.

The Regiam Majestatem was not printed until the year 1609, in the reign of James VI. The publisher was Skene, the Lord Clerk Register, who was called to the Bar in 1574. He was appointed by the king to publish the Laws of the Realm; but having, unfortunately, views of his own to advance in connection with the dependency of the Scottish monarchy, he opened the door to doubt as to the date of the work, and as to when it came to be adopted as an authority in the Law of Scotland.(*e*) The authenticity of the Regiam Majestatem has been the subject of much controversy. On the one side, Sir John Skene and Professor John Erskine, followed by many other writers, have declared themselves in favour of the authenticity of the work, contending that it forms a genuine code of the laws of Scotland promulgated by order of David I. On the other hand, Sir Thomas Craig, Lord Stair, Lord Hailes, with several others of note, express the opinion that the Regiam Majestatem has been copied from the Regiam Potestatem, a Digest of the English Law, written by Glanville, who was Chief-Justice of England from 1180 till 1189. This matter will be found fully discussed in "Lectures on the Law of Scotland," by Walter Ross, W.S., 1792, and in a recent address on the Historical Study of the Law, by the Right Honourable John Inglis, Lord President of the Court of Session.(*f*)

From whatever source taken, however, it is unquestionable that

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(*d*) Justinian's body of Roman law was compiled about the year 533. It consists—(1) of the Institutes, in four books containing the principles of the law; (2) of the Digest or Pandects in fifty books, containing the opinions and writings of eminent lawyers, extracted from 2000 volumes; (3) of the new Code, in twelve books, containing a collection of Imperial Constitutions; and (4) of the Novels or Novel Constitutions, which, to the number of 168, were enacted by Justinian after the publication of the Code. These form the Corpus Juris Civilis, as published about the time of Justinian. To this body of the Roman law is added the "Book of the Feus," explanatory of the customs and services due by vassals to superiors. The 118th of the above Novels forms the groundwork of the English Statute of Distributions. See Bowyer's Readings, also Commentaries on Civil Law.

(*e*) See opinions of Stair, Craig, Hailes, &c.

(*f*) Jour. of Juris. vol. ix. p. 157.

the Regiam Majestatem had been recognised by the Scottish Legislature for several centuries, as containing an outline of what was, at one time, the Law of Scotland.(*g*)

We shall here, therefore, present the rules of law in succession as laid down in that work, noting in footnotes the changes that have since been made thereon.

After an explanation "of the Quality and Difference of Heirs," the law is stated thus :—

3. The Succession of the Son to the Father.[1]—(1.) If any man having heritage deceases, and has but one son, without any distinction the son succeeds to all his father's heritage, whether he be born of the first wife, the second wife, or the third wife.(*h*)

(2.) And, therefore, if a man has had many wives, and with each one of them has gotten daughter or daughters, and with the last wife has gotten a son, that son only shall succeed to all his father's heritage and lands.(*i*)

4. Of the Succession of Sons to the Father.[2]—(1.) If a man deceases, leaving behind him more sons than one, a distinction is to be observed, whether the father was a knight,(*k*) having lands holden by knights' service (that is, by service of ward (*l*) and relief), or a soccoman.(*m*)

(2.) If the father was a knight, in that case his eldest son succeeds to all his heritage, and none of the rest of his brothers may crave any part thereof.(*n*)

(3.) If the father was a free soccoman, the heritage shall be

(*g*) Acts 1425, c. 54 ; 1487, c. 115.

(*h*) If the wife survive, the right of the heir is subject to terce, § 261.

(*i*) See note (*h*). For rules in Stair, see § 21 ; Mackenzie, § 28 ; Erskine, §§ 40, 41 ; Bell, § 70, *infra*.

(*k*) Knightship was the highest rank of a commoner, Bank. 1, 53.

(*l*) Wardholding was formerly the military tenure of Scotland. The ward and marriage of the heir were two of its casualties, and were of the most oppressive kind. The holding was abolished by 20 Geo. II. c. 20 ; where of the Crown, it was converted into blench, and where of a subject-superior, into feu-holding.

(*m*) A soccoman was one who held in blench or feu,—the return being agricultural services to the superior. In this tenure there was originally no primogeniture; the children succeeded equally, according to the rules of the Civil Law.—Reg. Mag. 2, 21 ; Bank. 3, 4, 17; Ersk. 1, 1, 35.

The distinction in this section does not now exist, § 246.

(*n*) The eldest son's right may be subject to the burden of terce. See § 261.

[1] R. M. 2, 26; Glan. 7, 3.

[2] R. M. 2, 27 ; Glan. 7, 3.

divided amongst all his sons by equal parts, if in old times that soccage was divided ;(*o*)

(4.) Reserving always the chief messuage(*p*) to the eldest son, in respect of the dignity of his birthright, for the which he shall satisfy his brothers according to the value thereof.(*q*)

(5.) If it was not in old times divided, then by the consuetude of some, the eldest son is heir of all the heritage ; and by the consuetude of others, the second son is heir.(*r*)

(6.) But if a soccoman has one son only, he shall be heir in all.

5. The Daughters succeed to the Father.[1]—(1.) If there be a daughter, the like is to be said of her as is said of a son.

(2.) If there be more daughters than one, the heritage shall be divided amongst them, whether their father was a soccoman, or a knight, or a burgess, or any other free man;

(3.) Reserving the chief messuage to the eldest daughter in manner foresaid.(*s*)

(4.) It is to be observed that, if any of the brothers or sisters amongst whom the heritage was divided happens to decease without heirs of his body lawfully gotten, his or her portion shall be divided amongst the rest of the brothers or sisters who remain living.(*t*)

6. The Son excludes the Daughter.[2]—(1.) If a man have a son, and also a daughter, or daughters, the son succeeds to all his heritage ;(*u*)

(2.) Because it is generally true that a woman is never partaker of any part or portion of heritage with a man.

(3.) And so the son born of the first wife, second wife, or last wife, succeeds to all and whole his father's heritage, and excludes all his sisters therefrom.

7. In what manner the Daughters of Sundry Wives

(*o*) See note (*m*). Distinction abolished. Eldest son or heir-at-law excludes the other children, § 246.

(*p*) Or principal dwelling-house.

(*q*) See note (*o*).

(*r*) See note (*o*). Stair speaks of Customs—*i.e.*, the common law; but states the rule as then fixed that eldest son excludes the other sons, and that daughters succeed equally. Stair, 1, 1, 16.

(*s*) The eldest daughter now gets more than the mansion-house, § 247.

(*t*) No division now, except where females succeed, §§ 246, 247. For rules in Stair, see § 26 ; Erskine, § 48 ; Bell, § 70.

(*u*) See note (*n*), p. 4.

[1] R. M. 2, 28 ; Glan. 7, 3 ; Num. 27, 8.

[2] R. M. 2, 30 ; Glan. 7, 3.

Succeed.[1]—(1.) It happens sometimes that a man has had sundry wives, and has begotten daughter or daughters with each one of them: all the daughters shall succeed to their father's heritage in such a manner as if they were born all of one mother.(*v*)

(2.) And this is to be understood of the father's heritage descending from him to them.

(3.) For if the heritage descend and come of the mother's side, each daughter(*w*) shall succeed(*x*) to the heritage of her own mother.(*y*)

8. The Succession of Grandchildren.[2]—(1.) If a man decease without son or daughter, and has grandsons or granddaughters by son or by a daughter, they all succeed to him in the same manner, and with the same distinction as is before said of a son and daughter.(*z*)

(2.) For they who descend in the right line are always preferred to them who descend of the collateral or side line.(*a*)

9. Of an After-born Son and a Son of a First-born Son.[3]—(1.) If a man decease having an after-born son,(*b*) and a son of his first begotten son already deceased, a great doubt and question used to be, which of them should be preferred to other in the succession of their father, whether the son or the grandson.

(2.) Some allege the after-born son to be more righteous heir than the grandson;

(3.) Because the first-born son deceased before his father, and so did not live nor remain to be his father's heir;

(4.) And therefore the after-born son did live after his father and his elder brother; they affirm that he rightly succeeds to his father.

(5.) Others are in the contrary (*and true opinion*), and say that the grandson gotten by the first-begotten son, by the law should be preferred to his father's brother;(*c*)

(*v*) The eldest daughter gets indivisible rights, § 247. See note (*h*), p. 4.

(*w*) Failing a son.

(*x*) Equally if more than one. See note (*v*).

(*y*) Under burden of father's courtesy, § 264.

(*z*) See §§ 3, 5. The succession does not now depend upon the rank of the deceased or the tenure of his estate. See § 258.

(*a*) For rules in Stair, see § 21; Mackenzie, § 29; Erskine, § 43; Bell, § 70.

(*b*) Second son.

(*c*) This is now the law, § 253.

[1] R. M. 2, 31; Glan. 7, 3.

[2] R. M. 2, 32; Glan. 7, 3.

[3] R. M. 2, 33; Glan. 7, 3.

(6.) For the grandson is descended of the first-born son, and is begotten of his body; if his father were as yet living, and happened not to decease before him, he would succeed to all the heritage pertaining to his father.

(7.) And this I say to be of verity, if his father was not forisfamiliate (*by the gudscher*).(*d*)

(8.) The son in the father's lifetime may be forisfamiliate, if the father gives and assigns to him a portion of land, and before his decease gives him sasine thereof, at the desire and goodwill of his son, so that he stand content, and confesses himself to be satisfied with so much of the land.(*e*)

(9.) The heir of the son gotten of his own body may crave no more from his father's brother of the rest of his gudscher heritage (*than that part which was assigned to his father*).(*f*)

(10.) Moreover, if the first-born son in his father's lifetime did make homage for his father's heritage to his chief over-lord, albeit he decease before his father, there is no doubt but the son of the first-born son (*that is the grandson*), will be preferred to his father's brother.(*g*)

(11.) But in this case, a pley may be betwixt the grandson and the chief over-lord, if the over-lord refuses to receive his homage (*to receive him as heir to his father*).

(12.) And likewise a pley may arise betwixt the over-lord and the father's brother, if the over-lord receives homage from the grandson and warrants the same to him, and hereanent the matter may come to singular battle betwixt them.

(13.) If it cannot be proven that the homage was made between the grandson and the father's brother, he shall be preferred who is in possession; for the condition of the possessor is best.(*h*)

10. Of Collateral Heirs.[1]—(1.) Failing of them who are descended in the right line, the brother or brothers succeed.(*i*)

(*d*) See § 118.

(*e*) The father may now disinherit the heir without compensation. Bell's Prin. § 1692; 32 & 33 Vict. c. 116, § 20; 37 & 38 Vict. c. 94, § 27.

(*f*) See note (*e*).

(*g*) Homage to, or confirmation of title by, the superior not now necessary, 37 & 38 Vict. c. 94, § 4.

(*h*) Possession of no avail without a title, §§ 267-70. For rules in Stair, see § 22; Mackenzie, § 30; Erskine, § 46; Bell, § 70.

(*i*) Brothers succeed in order of seniority, or inversely, each as he succeeds transmitting to his issue; first sons in their order, then daughters equally, § 253.

[1] R. M. 2, 34; Glan. 7. 3; Num. 27, 10 c. 36, 1.

(2.) And if there be no brothers the sisters succeed.(*k*)

(3.) And after their decease their bairns are heirs.

(4.) After them, being male or female, the father's brothers, or their bairns, have the right of succession.(*l*)

(5.) Last of all the father's sisters, or their bairns, are admitted to succession.(*m*)

(6.) But it is necessary to observe the distinction before mentioned, between the son of a knight, and the sons of a soccoman, and amongst grandsons, and also the distinction betwixt male and female.(*n*)

11. The Division of the Goods in a Testament.[1]—(1.) When a man in time of sickness not charged with debts will make his testament, all his moveable goods shall be divided in three parts equally; (2.) Whereof one part pertains to the bairns,(*o*) the second part to his wife,(*p*) the third part is reserved to him who makes the testament;(*q*) (3.) Of the which third part the maker of the testament has free power to make disposition thereof as he pleases. (4.) But if he has no wife at the time of his decease, the one half of the goods is reserved to him, to be disposed as he pleases, and the other half(*r*) to the bairns.(*s*) (5.) In his latter will he may make no disposition of his heritage, as is said before.(*t*)

12. Rules in *Quoniam attachiamenta*.[2]—In the Quoniam attachiamenta there are very few references to the law of intestate succession, and these mainly relate to the distinctions which for-

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(*k*) Equally as heirs-portioners, the eldest getting indivisible rights, § 247.

(*l*) The father takes precedence of his collaterals, § 256. The rule in the text was in accordance with the Jewish and ancient Roman law, Stair, 1, 26, 11-17. It was not until the Roman Empire and laws were trodden down, and the feudal law arose and became mixed with the civil law of the Romans and local customs, that the father obtained a place in the succession of his own children, Stair, 1, 26, 20-22.

(*m*) Sisters equally; their bairns, sons of each in their order, and daughters equally, §§ 247, 248. Relationship does not stop here. See § 68.

(*n*) See notes above as to soccoman and knight under § 4. For rules in Stair, see §§ 21-23; Mackenzie, §§ 29, 30; Erskine, §§ 43, 44, 46: Bell, § 70, *infra*.

(*o*) Now called *legitim*, § 100.

(*p*) Now called *jus relictæ*, § 91.

(*q*) Now called dead's part, § 114.

(*r*) Falls.

(*s*) As *legitim*, § 100.

(*t*) A father may now disinherit his heir. Bell's Prin. § 1692; 32 & 33 Vict. c. 116, § 20; 37 & 38 Vict. c. 94, § 27.

[1] R. M. 2, 37; Glan. 7, 3; Magna Charta, c. 18; Leg. Burg. c. 124. See §§ 57-60, as to meaning of testament.

[2] cc. 88, 89, 97.

merly obtained between successions in conquest and in heritage, and to the rules which exclude the half blood in competition with the full blood in the same line of succession.(*u*)

13. Rules in "Burrow Lawes." [1]—Here also the rules of succession are meagre. The chief rules in heritage are that if a burgess owning "any lands within burgh dies leaving a son, a daughter and a widow, the heritage goes to the son, failing him to the daughter, while the widow, as long as she remains a widow, gets a part of the deceased's house.(*v*) If a burgess owning more lands and tenements than one has sundry bairns by sundry wives, all the lands, as well the heritage as the conquest which were purchased in the time of the first wife and pertained to him at his death, go to the heir gotten betwixt him and the first wife: and sicklike is to be understood of the lands conquest in the second wife's time, except the same lands were given by him to any other before his decease: and, as to the second wife, she shall not remain in the house of the first heir after her husband's decease but the space of forty days."(*w*)

The heir has a right to heirship moveables.[2](*x*)

The husband of an heiress has a right to courtesy.[3](*y*)

As regards moveable estate, the rule of division is stated thus:[4] —"The custome is within the burghs of this realme, *passed memorie of man, quherof there is na memorie in the contrair*, that quhen ane burges hes children begottin with his awin wife and thereafter deceisses, the third part of all the gudes and geir perteines to the sonnes and dochters lawfully begottin. 2. And the eldest sonne and heire of that man and wife sall have the like parte and portion as the other bairnes, that is, equal with any of them except he be forisfamiliat of his father."(*z*)

14. How the Law Administered at this Period.—Such were the lines upon which legal succession appears to have been based at one time in Scotland. But how long these continued to be so cannot now be determined. For several centuries no work exists through which our legal history can be traced, nor have we any earlier judicial reports than those of Lord Stair, which com-

(*u*) Conquest now abolished, § 257.
(*v*) Widow now takes terce, § 261.
(*w*) This distinction abolished, § 259.
(*x*) Heirship moveables abolished, § 237.
(*y*) Under certain conditions only, see § 264.
(*z*) Altered, see § 120. But rule in text is according to English law, § 218.

[1] cc. 25, 26. [2] c. 125. [3] c. 44. [4] c. 124.

mence in 1661, and end in 1681. The private collection of Lord Durie(*a*) was not published till 1690.

This want of history may be attributed to various causes. In the first place, Scotland was in almost constant state of warfare with England for several centuries. Printing was not introduced into Scotland until the Reformation; and, until that time, the Roman clergy were the judges in the Consistorial Courts, and, with the exception of two volumes, all their judicial records were either destroyed or carried abroad during the violent commotions which preceded the final subversion of Popery in Scotland.(*b*) The "Lords of Session" were also "mutable and ambulatory"(*c*) until the College of Justice was perfected in 1540 by James V., and, like their *confrères* the clergy, they conducted their proceedings for a long time with closed doors and in secret. The Civil Courts remained so closed until 1693, and the Commissary or Consistorial Courts until 1812.(*d*)

No wonder, therefore, that much obscurity should now exist as to the early history of our Law. Lord Kames,(*e*) who made an attempt to trace that history, gives it as his opinion that the Laws of Scotland and England were originally the same in almost every particular. This opinion is certainly strengthened by the fact that, in the Regiam Majestatem, the English works of Glanville, Bracton, and Fleta, which were published successively in the reigns of the three Henries of England, are frequently quoted as authorities. Indeed a large portion of the Regiam Majestatem is almost a copy of Glanville's Regiam Potestatem.(*f*)

At this period it was the law in personal succession in England that, after payment of debts, the residue of the estate of a person deceased was to be divided into three parts where there were children and a widow; the children got one part, the widow another part, and the third part was dead's part. Where there were children but no widow, one half went to the children and the other half was dead's part. Where there was a widow but no children, the division was also into two parts. And where the

(*a*) A Lord of Session from 1620 till his death in 1642.

(*b*) In Bain's Calendar of Documents already referred to, it is stated (p. 10) that after the Restoration, all the Scotch papers that were supposed to remain in the Tower of London were shipped for Scotland and were lost in a storm on the passage.

(*c*) Stair, 1, 13, 3.

(*d*) Ferguson's Consis. Law, p. 18.

(*e*) Ab. Stat. p. 429.

(*f*) Robertson on Personal Succession, p. 23.

deceased was unmarried, the whole was dead's part. The dead's part only could be willed by the deceased.(*g*)

It will be observed that at this time, the rules in personal succession were substantially the same in England as in Scotland.

In the Regiam Majestatem the rules regarding personal succession are very short, while the rules regarding heritable succession are stated at considerable length. The reason of this appears to be that in those days of rampant feudalism, commerce was at a low ebb; no profession except that of arms was deemed honourable. Land, houses, and animals formed the bulk, at least, of the public wealth. Personal estates became of account only after the days of feudalism began to decline. Until then, and for some time afterwards, the Roman clergy looked after such estates. Down to the Reformation all questions relating to personal successions and matrimony were attached to the ecclesiastical polity of the kingdom.(*h*) The Roman bishops who, within their respective dioceses, were termed the ordinaries, administered justice according to the Canon Law, with appeal only to the supreme Consistory of the Pontiff at Rome.(*i*) Their proceedings were conducted with closed doors and in Latin. No record of these proceedings now exists, but it appears to have consisted with their notions of justice to enrich themselves at the expense of the relatives of intestates. The doctrine that the personal estate of every intestate should be laid out for promoting the good of his soul was solemnly inculcated.(*k*) At the first, advice only was given in this direction; the advice, however, soon became a command; and so, in process of time, it came to be settled law that where a man died intestate, neither his wife, child, nor next-

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(*g*) Bracton, 2, cc. 60, 61; Fleta, 2, c. 67.

(*h*) The clergy assumed jurisdiction not only in questions of succession and matrimony, but of teinds, patronages, scandals, oaths, and every other matter which might, with any propriety, be styled ecclesiastical. Their jurisdiction was so extensive as to oblige them to commit the exercise of their powers to their vicars, who are, in the Act 1466, c. 8, called officials or commissaries. Hence the Commissary Court was called the Bishop's Court or Consistorial Court.

(*i*) Ferguson's Consis. Law, p. 11.

(*k*) In Wycliffe's days the Roman clergy inculcated the doctrine that to obtain pardon for sins, "the people should fast, go bare-headed, wear no linen, and whip themselves." And even the great Lord Chancellor (More) of England, beheaded in 1535, held that the traditions of the Church were of as great authority as the Bible ("The Book and its Story," pp. 130, 153).

of-kin had right to any share of his personal estate ; all went to the ordinary, to be devoted to pious uses as his conscience directed.(*l*) None of the intestate's relatives, not even his widow or children, had power to call the will of the ordinary in question : the law trusted him with the disposition of the whole estate. At first the rights of creditors even had to yield to the ordinary's disposition for the good of the deceased's soul. But this extreme injustice was removed by an Act of William the Lyon, in the thirteenth century, which took away some of the ordinary's perquisites. That Act provides that :—"1. Gif ane free man decease intestat, his gudes sal be distributed be the sicht of his friends, parents, and be the provision of halie kirk, reservand to all creditors the debts auchtand to them be the defunct. 2. After the decease of anie man intestat, and awand debts to creditors, his gudes sould be disponed be his ordinar ; and the ordinar sal be oblissed to answer for the debts, sa far as the gudes and geir will extend. 3. In the samine maner that the executors sould doe in case the defunct had made ane testament."(*m*)

In process of time the bishop, in granting confirmations, mercifully restricted his claim to the "dead's part." This might be a third of the free estate, or might be the whole estate, when, from immaturity of age or other causes, the deceased was incapable of making a will, or had failed to exercise that power. Previous concessions by the bishops appear, however, to have emboldened the people. The loss to the deceased's relatives of the whole of even the dead's part came to be regarded as a serious grievance, and soon the legislature passed the Act 1540, cap. 120.(*n*) That Act provides that "For sa meikle as ofttimes zoung persones dies that may not make testamentes, the ordinares usis to give their executoures datives to their gudes, quhilkis intromettis therewith, and withdrawis the gudes fra the kin and friendes that suld have the samin be the law, it is statute and ordained be the three estates of this present Parliament that quhair ony sik persons dies within age that may not make their testamentes, the nearest of their kin to succeed to them sall have their gudes, without prejudice to the ordinares anent the quote of their testamentes."

This Act, however, still reserved to the ordinary the "quote of the testament" for granting confirmations ; and, strange as it may

(*l*) Kames' Essays.
(*m*) Reg. Mag. 312.
(*n*) See § 57.

appear, this "quote" continued to be exacted long after the bishops' reign came to an end, though under the name of "composition dues," until, indeed, the passing of the Act 4 Geo. IV. c. 97, in the year 1823.

The bishops lost their judicial powers at the Reformation in 1560. On the 24th of August of that year an Act was passed, in which it was enacted under penalties "that the bishope of Rome have na jurisdictioun nor autoritie within this Realme in tymes coming . . . and that na bishope nor uther prelate of this realme use any jurisdictioun in tymes to come be the bishope of Romes autoritie."

This ended the bishop's quote, as well as his authority, in matters consistorial. But it was not until 1563 that the Superior Commissary Court was established in Edinburgh. Upon its establishment there was conferred on it a right to review the proceedings of all inferior courts; and its proceedings were, in turn, subject to review by the Court of Session. This state of matters continued until the Restoration of Episcopacy, when the Act of 1609, cap. 6, again bestowed upon churchmen the right to elect the commissaries; but at the Revolution the patronage of these courts again reverted to the crown, and the judicial was then permanently separated from the ecclesiastical polity of the kingdom.(*o*)

In the year following the Restoration, instructions were issued to the commissaries with regard to confirmations, and in these it is stated,(*p*) after specifying what debts were to be deducted from the inventory, that if the deceased "leivand behin him wife and bairnis, gif any of the bairnis be unforisfamiliat, the testament dividis in thré partis, and the thrid of the fré geir payis quot."

"Gif all the bairnis be forisfamiliat the testament then dividis in twa partis, and the half of the fré geir payis quot."

"Gif thair be na bairnis the testament dividis likewayis in twa, and the half of the fré geir payis quot."

"Gif the persoun deceist be singil, and hes na bairnis unforisfamiliat, in that cais the haill fré geir payis quot but ony divisioun."

In this way, as stated by Erskine,(*q*) the provisions of the Act

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(*o*) The Charter of Constitution is printed in Balfour's "Practicks," p. 670.

(*p*) Balfour's "Practicks," p. 666.

(*q*) § 57.

of 1540 were extended to the cases of persons of full age dying intestate.

Another important statute for settling the law of succession was passed in the reign of Henry VI. (1617, c. 14). It is in these terms:—

"Our Soveraigne Lord understanding that a great number of ignorant people, the time of their sicknesse and disease, or otherwise at the making of their testaments and latter wills, do nominate certain strangers to be their executors, meaning only to commit the care of their goods, and diligent ingetting thereof, to the saids strangers, and that to the behoof of their children, or other persons who are nearest-of-kin: whereas, by the contrary, the said office of executry, by the interpretation now observed, doth carry with it the whole profit and commoditie of the defunct's part of the goods contained in testament; which His Majesty findes to be altogether against law, conscience, and equity: therefore his Majesty, with advice and consent of the estates of Parliament, finds and declares, that all executors, already nominate in any testament not as yet confirmed, or to be nominate in any testament to be made hereafter, are and shall be obliged to make count, reckoning, and payment of the whole goods and geare apertaining to the defunct, and intrometted with by them, to the wife, children, and nearest-of-kin, according to the division observed by the laws of this realm; reserving onely to the saids executors the thrid of the defunct's part, all debts being first payed and deduced, without prejudice always to the saids executors of whatsoever legacies left to them by the saids defuncts, which shall no wayes be prejudged by this present act; but the saids executors shall have full right to their saids legacies, albeit the same exceed the said thrid of the defunct's part; and in case the saids legacies exceed the whole thrid part, the saids executors shall have right to the whole legacie and no part of the thrid; with this expresse declaration, that where legacies are left to the executors, they shall not fall both the saids legacies and a thrid by this present act, but the saids legacies shall be imputed and allowed to them in part of payment of their thrid."

The right conferred on executors nominate by this statute continued until abolished by the Intestacy Act, 1855.

By the said Act, 4 Geo. IV. c. 97, the local Commissariat of Edinburgh was limited to the three counties of the Lothians; its jurisdiction in actions for civil debt was abrogated; its power to

review the sentences of the inferior commissaries was abolished; the inferior commissariats, as then subsisting, were abolished, and in their room, each sheriffdom was constituted a local commissariat, and the power of reviewing its sentences was transferred to the Court of Session as the immediately superior judicature of appeal.

By the 4 Geo. IV. c. 98, the mode of granting confirmations in all these commissary courts was regulated anew; and it provides that, in the event of the death of the party entitled to succeed before confirmation is obtained, the right to apply for such confirmation shall transmit to his nearest-of-kin *ipso jure*.

Balfour's "Practicks."

15. Balfour's Career and Estimate of his Work.—After the Regiam Majestatem, no general compilation of Scottish Law was made until near the end of the 15th century, when there appeared the work entitled "Practicks, or a System of the More Ancient Law of Scotland, compiled by Sir James Balfour of Pittendreich."

Sir James was a man of very varied accomplishments. In his younger days he is said to have studied divinity, law, and politics. We first hear of him in 1546 consorting with "some gentlemen of Fife" in an attempt to keep possession of the Castle of St. Andrews after the assassination of its owner, Cardinal Beaton. He does not appear to have taken part in the Cardinal's death, but soon after that event he joined those who were in the castle, and remained with them there until the castle was demolished by the French, when he and others were carried prisoners to France. Four years afterwards he escaped from France, and, on arrival in Scotland, was made "official of Lothian," and subsequently, having joined in the Reformation, was made "Rector of Flisk." In 1563 he was made a Lord of Session; in the following year, chief of the four Commissaries of Edinburgh; in 1565, a Privy Councillor; in 1566, Lord Clerk Register, and knighted; and in 1567, Governor of the Castle of Edinburgh under James, Earl of Bothwell. Upon Bothwell's death, and the Earl of Murray becoming Regent in the same year, the Castle of Edinburgh was taken out of Sir James's hands, but Murray made him a Lord of his Privy Council, Commendator of the Priory of Pittenweem, and President of the Court of Session. In 1569 Sir James was accused by Matthew, Earl of Lennox, of

the murder of the king, Lennox's son, and was thereupon confined by Murray, but he was soon liberated without trial. Upon Murray's death in the following year, Sir James openly identified himself with Queen Mary's party, and assisted to bring about the Pacification at Perth in 1573, but soon afterwards Morton incited some ecclesiastics against him in connection with the murder of King Henry, and he was obliged to fly to France, where he remained until 1580. In that year he returned to Scotland, and, in his turn, accused Morton of having been accessory to the king's murder, and eventually succeeded in getting Morton convicted and beheaded. This, however, brought upon him the displeasure of the English Court, and through its influence he was again obliged to fly from Scotland for protection. He died in 1583.

It will thus be seen that the varied occupations in which Sir James from time to time engaged did not conduce to high attainments as a lawyer. At the present day the "Practicks" are not much referred to in practice; moreover, the work is considered to be of doubtful authority. It was not published until 1754, or 170 years after Sir James's death.

The work bears to have been published from *several* manuscripts, and these have been mostly, or nearly all, copies. In the preface the work is stated to contain "the Acts of Parliament from the 19th year of King James I., the Books of the Regiam Majestatem, with the Statutes of our Kings before James I., and divers other law treatises that are found in the manuscript copies to accompany the Regiam Majestatem: as also the decisions of the Court of Session as well before as after its more fixed and regular constitution in the reign of James V."

As regards succession, the "Practicks" refers to the law as laid down in the Regiam Majestatem, but does not state the changes which had taken place in the intervening period.

Craig's "Jus Fudale."

16. Estimate of Craig's Work.—The next institutional writer was Sir Thomas Craig, who was born in 1538, and died in 1608. He was educated at Paris, and was called to the Scotch Bar in 1563. In 1655 was published his "Jus Fudale," which still remains a high authority on the original fundamental principles of the feudal system. Educated in a foreign school of jurists, he might well have written a valuable

digest of Scotch Law; but, instead of arranging and commenting on the peculiar laws and institutions of Scotland, he drew their wisdom from the two great fountains of European jurisprudence —the Roman Law and the feudal customs. While his work has thus an air of scholarship and wide reading, it contains little or no practical information which would conduce to the elucidation of the present subject.

Stair's Institutions.

17. Estimate of Stair's Work.—The first and greatest teacher of Scotch law as a system was James Dalrymple, Lord Stair. Stair was born in 1609; was appointed Professor of Philosophy in Glasgow in 1641; was called to the Bar in 1648; was appointed by Cromwell's Government one of the "Commissioners for the administration of justice" in 1657, but resigned in 1663, because he could not take the "Declaration" oath, which denied the right of the nation to take up arms against the king. His great talents, however, induced the king to accept his services on his own terms, and accordingly, in 1671, he became Lord President of the Court of Session. Ten years afterwards he had to resign all his appointments, because he refused to take the "test" oath. He then went to Holland, where he lived several years, and on his return to Scotland, he was reappointed Lord President of the Court of Session. He died in 1695.

Stair's Institutions were published in 1681. A large portion of the work is devoted to succession, a branch of the law which Stair holds to be most important, in respect "the rights of all persons pass once, and frequently often, in every generation." After stating the division of the channel of succession into two currents, heritable and moveable, he proceeds to treat, firstly, of that which is common to succession, and secondly, of that which is proper to the several kinds thereof. Under the first head he speaks of—(1.) What natural equity holds forth of succession; (2.) What the Judicial Law; (3.) What the civil Roman Law; (4.) What the feudal customs; and (5.) What our own law and consuetude provide concerning successions. Each of these heads is treated at considerable length, and then the author proceeds as follows:—

18. Succession in Moveables and Immoveables.[1]—"To

[1] Tit. 26, sec. 23.

return to our customs(*r*) in succession, . . . it is divided in two branches, the one is of moveables, the other of immoveables,(*s*) which do as much differ as the customs of divers nations; the successor in immoveables doth only retain the name of heir, and therefore immoveables are called heritable rights, and that part of the moveables which belongs to the heir is called heirship moveable.(*t*)

"The successor in moveables, from the office of executing the defunct's will, express or presumed, is called Executor.(*u*)

"We shall here, summarily at one view, set forth the whole matter of succession with us, which we shall more fully and distinctly follow in the ensuing titles. . . .

"As to moveables, we shall not repeat what hath been said of the distinction of heritable and moveable rights,(*v*) whether goods or moveable debts; but shall only hold forth what becometh of moveable rights, after the owner's decease:(*w*) and, first, if the defunct be married, there was thereby a communion of goods(*x*) betwixt the defunct and the other spouse, which being dissolved by death, the survivor may withdraw(*y*) their share, which share is estimate by the condition of the family at that time; for if in the family there were a husband, a wife and children not *forisfamiliat*,(*z*) the wife's share is the third;(*a*) but if there were no child *unforisfamiliat*,(*b*) the wife's share is the half, which is not properly a succession, but a division."

19. The Several Degrees of Succession in Moveables.[1]—"The first degree of succession in moveables, with us, is by the will of the defunct, by his testament or codicil. . . .

"The will of the defunct is restrained with us, in three cases: the first is, bastards cannot at all test, or leave legacies, unless

(*r*) §§ 1, 3-12.

(*s*) Moveable and immoveable rights defined, §§ 83, 235.

(*t*) Heirship moveables now abolished, § 237.

(*u*) There are various classes of executors, § 138.

(*v*) See note (*s*).

(*w*) *I.e.*, intestate.

(*x*) This doctrine of "communion of goods" does not now obtain, § 89.

(*y*) "Withdraw" is not a correct expression; the share of the survivor is of the nature of a debt—a debt postponed to creditors, and emerging only on the death of the predeceasing spouse, § 89.

(*z*) See § 118.

(*a*) Now called *jus relictæ*, § 91.

(*b*) This clause should read thus: If there were no child, or no child who has not been forisfamiliated or settled with (§ 118), the wife's share is, &c.

[1] Tit. 26, sec. 24.

they be legittimat or have power from the king of making testament, or have lawful children.(*c*)

"(2.) A father is bound up in respect of his children in his family, which are not *forisfamiliat*,(*d*) and provided for; these have necessarily their portion natural, and bairns' part of gear,(*e*) wherefrom their father cannot exclude them by legacies or otherways, as by donations, in contemplation of death, or any other gratuitous deed, done on death-bed.(*f*) . . . And therefore a father hath only power to dispose upon such a part of his goods, which are thence called dead's part,(*g*) which, if he have a relict, and bairns in the family, the bairns' part is the third, the relict's part is also a third, and so the defunct's part is only a third; but if there be no relict, then the bairns' part is the half, and the dead's part is the other half; but if there be neither wife nor bairns, the defunct may dispose of the whole, as persons never married, or wives upon whom there is no restriction,(*h*) though they have husband or children, for they may dispose of their share of the husband's moveables,(*i*) or if they acquired, or succeed to any moveables, in viduity, they may entirely dispose thereof, though they have children.(*k*) . . .

"(3.) The third restriction of the defunct's will is in favour of their heirs of line, for heirs having the sole interest in heritable rights are by our custom justly excluded from coming in with other children, in moveables,(*l*) except that which is called heirship moveable,(*m*) which is the best of every kind of moveable,(*n*) wherein the defunct's will cannot prejudge the heir.(*o*) . . .

"The second member(*p*) of succession in moveables is from the intestate; so that, failing the defunct's will, with the restrictions

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(*c*) Bastards can now make wills, § 126. See § 78 as to who can make wills.

(*d*) See § 118.

(*e*) Now called *legitim*, § 100.

(*f*) This means any testamentary deed. Law of death-bed abolished since 16th August, 1871; 34 & 35 Vict. c. 81. See §§ 104-110.

(*g*) Explained, § 114.

(*h*) The moveable estates of wives not now subject to *jus mariti*, §§ 89, 90.

(*i*) I.e., *jus relictæ*.

(*k*) Children have now an indefeasible right in the moveable succession of their mother, § 113; so also have husbands on the predecease of the wife, § 99.

(*l*) This takes place only where the heir takes the heritage by operation of law, § 123.

(*m*) See note (*t*), p. 18.

(*n*) As to what was included under heirship moveables, see § 51.

(*o*) This also stated by Erskine, see § 51; but see Bell's Prin. § 1908.

(*p*) This term is here used to distinguish intestate from testate succession.

aforesaid, the nearest-of-kin(*q*) have interest both in the defunct's moveables and office of executry;(*r*) and, though they claim not the office, yet have they a right to the goods, leaving a third of dead's part to the executors for administration of the office.(*s*)

"These nearest-of-kin take place all in order; all the nearest degree, male or female, come in equally;(*t*) and there is no right of representation in moveables.(*u*) The first degree is children, male or female, with whom grandchildren come not in by right of representation in place of their defunct parents; so children have an interest in their father's moveables—viz., their bairns' part,(*v*) wherein their father cannot prejudge them and their interest as nearest-of-kin, whereby they succeed to the dead's part in so far as intestate. Next unto children are grandchildren, or any descendants of the nearest degree.(*w*) Next unto these are brethren and sisters,(*x*) wherein brethren and sisters-german or by both bloods, exclude those by one blood. Next unto brethren and sisters are their descendants in the nearest degree without representation.(*y*) And last are the nearest degree of agnates(*z*) male and female jointly without representation. If there be no descendants or agnates in the case of bastards, who can have none,(*a*) or others who happen *de facto* to have no children or agnates,(*b*) their goods become caduciary, and are confiscated(*c*) to the king as last heir, or by reason of bastardy.(*d*) . . .

(*q*) Nearest-of-kin may now be in different degrees, § 84.

(*r*) As to persons eligible for office of executor, see § 139.

(*s*) This right, which belonged to executors-nominate only, abolished by § 8 of Act 1855, App.

(*t*) See note (*q*.)

(*u*) Representation now admitted among descendants and collaterals of intestate, § 125.

(*v*) Now called *legitim*, § 100.

(*w*) See note (*u*).

(*x*) By statute father now takes one-half, and failing him, mother one-third, preferably to brothers and sisters, § 129.

(*y*) Altered, see note (*u*).

(*z*) After brothers' and sisters' descendants, come brothers- and sisters-consanguinean and their descendants; after them the father at common law; after him (to the extent of one-half of the succession) brothers- and sisters-uterine and their descendants; and after these the kin as in the text, § 129.

(*a*) Bastard's children succeed to him, § 126.

(*b*) Mothers and brothers- and sisters-uterine and their descendants take one-third, and one-half under certain circumstances, § 129.

(*c*) Confiscation takes place only in the failure of the three lines of succession, and upon satisfaction of the claims of the persons indicated in note (*b*), § 129.

(*d*) See effects of bastardy, § 126; also §§ 65-67; for rules in Mackenzie's Inst. see § 33; Bankton's, § 38; Erskine's, § 53; Bell's, § 72.

20. Succession in Heritable Rights.[1]—"Succession in immoveable and heritable rights(*e*) proceeds wholly in a different manner; for succession in moveables is more near to the course of natural succession and to the civil law of the Romans, especially their ancient and middle law; but the succession in heritable rights agreeth more to the recent feudal customs of most nations, whereby primogeniture is established for the honour and preservation of noble families, and in them for the good and safety of their kings and countries."

21. Kinds of Heirs in Scotland.[2]—"Succession in heritable rights in Scotland are either by the will of the fiar,(*f*) or by law *provisione hominis* or *legis*. Heirs by the course of law are called heirs of line, as befalling by the line of succession appointed and known in law; all other heirs do cross or cut that line, and therefore are called heirs of tailzie, from the French word *tayler*, to cut.(*g*) . . . As regards heirs of line, the law hath ordered them thus: first, The eldest lawful son and his descendants in order, by right of primogeniture, excludeth all other descendants, male or female;(*h*) failing sons, the daughters and their descendants do all succeed equally,(*i*) except in rights indivisible,(*k*) which fall to the eldest; failing descendants, the next degree is of the next immediate brother-german and his descendants, and among middle brethren the immediate elder brother succeedeth in conquest,(*l*) whereunto the defunct did not, nor could not succeed as heir; but in all others the immediate younger brother succeedeth,(*m*) and therefore is called the heir of line, and the other the heir of conquest.(*n*) If the fiar be a woman, her brother-german(*o*) excludeth sisters-german, and of her brothers, the immediate elder brother succeedeth in conquest,(*p*) and the immediate

(*e*) Heritable rights defined, § 235.

(*f*) Fiar here means proprietor, but ordinarily term now applied to person vested in heritable property subject to a right of liferent in another.

(*g*) See §§ 28, 40, 242; heir-of-line is synonymous with heir-at-law, heir-general, heir whatsoever.—Bell's Prin. § 1696.

(*h*) The right may be subject to terce or courtesy. See §§ 261, 264.

(*i*) Daughters succeed equally; but among their descendants, sons in their order exclude daughters, § 248.

(*k*) As to what these rights are see § 48.

(*l*) Conquest abolished, § 236.

(*m*) Failing a younger brother and his issue, the elder brothers and their issue succeed in inverse order, § 253.

(*n*) Conquest abolished, § 257.

(*o*) And his issue, male and female, § 253.

(*p*) Conquest abolished, see § 257.

[1] Tit. 26, sec. 25.

[2] Tit. 26, sec. 33.

younger in heritage ;(*q*) failing brothers-german,(*r*) sisters-german and their descendants(*s*) exclude both brethren and sisters by the father's side only ; failing brothers- or sisters-german,(*t*) brothers by the father's side succeed to the defunct, whether male or female, the immediate elder in conquest,(*u*) and the immediate younger in heritage.(*v*) Failing all brothers and sisters,(*w*) the father, or other masculine ascendant of his line succeeds to the defunct, whether male or female, and excludes the brothers or sisters of that ascendant, as a grand-grandfather excludes his brethren, but not father's brethren to the defunct.(*x*) Failing ascendants,(*y*) the father's brothers, and father's sisters and their descendants, succeed in all points as brothers and sisters, the double blood excluding the single blood, (*z*) and the immediate elder brother succeeding in conquest,(*a*) and the immediate younger in heritage ;(*b*) and all failing, the grandfather ; and failing him, his brothers and sisters the same way ; and so upward till there can be any propinquity of blood proved ; which all failing, the king taketh place as last heir."(*c*)

22. No Place for adopted or Cognates(*d*) in Succession.[1]—"In this line of succession observe—(1.) That there is no place for adopted children, or their issue, but only for the natural issue of the vassal, which cannot be changed by a voluntary act of adoption, without consent of the superior in the investiture ;(*e*) neither is adoption in use with us in any case. (2.) These natural heirs must

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(*q*) See note (*m*).

(*r*) And their descendants, § 246.

(*s*) Sons in order of seniority, and daughters equally, § 246.

(*t*) And their descendants, § 253.

(*u*) See note (*m*).

(*v*) Failing brothers on the father's side and their descendants, sisters on the father's side succeed equally and their issue, § 254 ; see also note (*m*).

(*w*) German and consanguinean and their descendants, § 256.

(*x*) This passage is a little involved ; it means that the father and grandfather, each in his own line, excludes his own brothers and sisters.

(*y*) For "ascendants" read "father."

(*z*) This means half blood consanguinean, not uterine, § 255.

(*a*) Altered, see §§ 236, 257.

(*b*) See note (*m*).

(*c*) For rules in Mackenzie's Inst. see §§ 28-30 ; Bankton's, § 38 ; Erskine's, §§ 40-48 ; Bell's, §§ 69, 70.

(*d*) "Adopted" does not mean that legal descent cannot be altered by deed, Bell's Prin. § 1691 ; Cognates means relatives on the mother's side; Agnates, relatives on the father's side ; Bell's Prin. § 2078.

(*e*) Legal descent may be altered by deed without the superior's consent, Bell's Prin. § 1692.

[1] Tit. 26, sec. 34.

also be lawful, whereby bastards are excluded.(*f*) . . . (3.) There is no place for cognates, as to the mother, grandmother, or other feminine ascendant, or those of their side, but only to agnates conjoined by the father, grandfather, &c., which holdeth, even though the heritage descended from the mother or those of her side.(*g*) . . . (4.) In all this line of succession there is place for representation of descendants, in place of their defunct parents;(*h*) so that females of a further degree, by the right of representation, exclude males of a nearer degree; as the eldest son's daughter will be preferred in the grandfather's inheritance to his other sons in private rights, though that be controversed by the more common feudal customs, as is largely and learnedly disputed by Tiraquellus."(*i*)

23. Parents Succeed to their Children, and exclude Collaterals, &c.[1]—"In this lineal succession the father, grandfather, or other ascendants of the paternal line, succeed in heritable rights, next unto brothers and sisters,(*k*) and before all other collaterals or agnates.(*l*) . . . The reason why brothers and sisters of the defunct are preferred to the father with us, may be, because such fees do commonly proceed from the father, and therefore, by the continuance of that same fatherly affection, are derived to the brothers and sisters, and because they are in more need of provision than the father."

In treating of the interests of the several kinds of heirs, Lord Stair says:—

24. Heirship Moveables.[2]—"Heirs have also right to moveable heirships.(*m*) . . . Heirship moveable is the best of every kind of moveables, belonging to the defunct, which the heirs of line may draw from the executors, whereof there is an ordinary list.(*n*) . . . Heirship moveables is established by the Act of Parliament, 1474,

(*f*) As to bastards, see § 126.

(*g*) Heritage acquired from or through the mother never ascends to the maternal line after it has vested, § 249; Heritage now vests without service, § 239.

(*h*) Representation is also admitted among collaterals, § 245.

(*i*) For rules in Mackenzie's Inst. see § 30; Erskine, § 46.

(*k*) And their descendants, § 259.

(*l*) This means that the father excludes his own collaterals, and that these succeed in manner mentioned in § 21, to the exclusion of the grandfather, and so forth, § 259.

(*m*) This right abolished as from 31st July, 1868, § 237.

(*n*) See *Darg.* 23rd Dec. 1808.

[1] Tit. 26, sec. 35.

[2] Tit. 27, 7 and 9.

cap. 53. . . . It is not always a single thing, but goeth sometimes by pairs, and sometimes by dozens, as in spoons. So the heirship of oxen was found to be a yoke, and not a single ox. . . . And heirship taketh place only in *corporibus*, but not in *quantitatibus*, as in(*o*) money, cloath, mettal, &c. And so the shell of a salt-pan which was out of use was accounted but iron, and not to fall under heirship moveable."(*p*)

25. Heirs of Conquest.[1]—"Heirs of conquest(*q*) . . . have only place where there is an elder and younger brother, or an elder and younger father brother, &c., and their issue to succeed: in which case the law alloweth two heirs, the immediate elder succeedeth in conquest, and the immediate younger in the heritage.(*r*) Therefore the one is specially called the heir of conquest, and the other retaineth the common name of the heir of line. Conquest is *feudum novum*, whereunto the defunct did not succeed as heir to any person, or whereunto the defunct could not succeed as heir, for if that were disponed to him by the defunct, whereunto he would have succeeded, it were but *Preceptio hæreditatis*, and so remained to be repute as heritage to descend to the younger, and not to ascend to the elder."(*s*) . . .

26. Heirs-Portioners.[2]—"Heirs-portioners are amongst heirs of line, for when more women or their issue succeed, failing males of that degree, it is by the course of law that they succeed; and because they succeed not in *solidum*, but in equal portions,(*t*) they are called heirs-portioners; and though they succeed equally, yet rights indivisible fall to the eldest alone, without anything in lieu thereof to the rest. As (1.) Dignity of lord, earl, &c. (2.) The principal manse,(*u*) being tower, fortalice, &c., which doeth not extend to houses in burghs, nor to ordinary country houses, the former being divisible, the latter falls under division,

(*o*) "Victual" introduced in last edition.

(*p*) See notes to last edition of Stair, p. 330. For rules in Mackenzie's Inst. see § 31; Erskine, § 51; Bell, § 73.

(*q*) Conquest abolished as from 1st Oct. 1874, §§ 236, 257.

(*r*) If there be no immediate younger, the immediate elder brother succeeds in heritage, § 253.

(*s*) For rules in Mackenzie's Inst. see § 32; Erskine, § 49; Bell, § 71.

(*t*) *I.e.*, in the case of females only; the issue of females except they be all females, succeed not equally, but sons first in their order, with their issue, then daughters equally, § 248.

(*u*) Mansion.

[1] Tit. 27, 10.

[2] Tit. 27, 11.

as pertinents of the land whereupon they stand, and are not as *separata jura* or distinct rights. (3.) Superiorities are accounted indivisible,(*v*) and befall only to the eldest daughter and her issue, and thereby all the casualties of the superiority, either preceding or following the defunct's death."(*w*)

Mackenzie's Institutes.

27. Estimate of Mackenzie's Work.—Three years after the publication of Stair's Institutes, Sir George Mackenzie, or "the bluidy Mackenzie," published his Institutions of the Law of Scotland, namely, in the year 1684. Sir George was born in 1636, and, like his coadjutors, studied law in France. He thereafter passed advocate; entered Parliament in 1669; was named King's Advocate in 1677, and died in 1691. Sir George, in the midst of his professional labours, prosecuted literature with much assiduity, and published several well-known literary works. His devotion to literature is probably the reason why his Institutions contain so little of what might be expected in commentaries of the law. The work is meagre for a commentary on the law. Lord Bankton speaks of it as "a kind of epitome of Lord Stair's work, and as comprehending in miniature most of the principles of our law." The size is 250 pages 12mo. We extract the following from the fourth edition published in 1706:—

I. HERITAGE.

28. Kinds of Heirs.—With us there are several kinds of heirs, distinguished by their several denominations. The first and chief kind of heirs are the heirs of line who are so called because they succeed lineally according to the right of blood, and they succeed thus:—

"First descendants according to the proximity of their degree, in which the eldest son is preferred to all his brothers, and all the brothers to the sisters, and if there be only sisters they succeed all equally.(*x*) The next degree is grandchildren and

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(*v*) Superiorities where substantial fall to be divided; see note (*o*), § 48.

(*w*) For rules in Erskine's Inst. see § 48.

(*x*) Indivisible rights go to the eldest sister, § 247; Rule of descent too broadly stated here, see § 259; the heir's right may be subject to terce or courtesy, §§ 261, 264.

their great-grand-children, &c., who succeed all in the same way."(*y*)

29. Collaterals.—"If there be no descendants, then collaterals succeed, in which the first degree is brothers- and sisters-german,(*z*) for the whole blood excludes the half-blood, and brothers the sisters, and brothers(*a*) by the father's side exclude brothers by the mother's side; there being no succession with us by the mother's side. Failing descendants and brothers and sisters, whether german or consanguinean,(*b*) the succession ascends first to the defunct's own father, who excludes all his own brothers and sisters, the defunct's uncles and aunts; and failing them,(*c*) the father's brother(*d*) (observing the same rules formerly mentioned in the succession of brothers and sisters), and failing the father's brothers and sisters,(*e*) the grandfather, and after him his brothers and sisters the same way, according to the propinquity of blood: and so upwards as long as any propinquity can be proven, all which failing, the king succeeds as *ultimus hæres*."(*f*)

30. Right of Representation.—"It is to be observed that in heritage there is a right of representation whereby the descendants exclude still the collaterals, though the latter be nearer by many degrees to the stock or *Communis Stipes;* and thus the great-grand-child of the eldest son secludes the second brother, because he comes in place of, and so represents the elder brother, his great-grandfather."(*g*)

31. Heirship Moveables.(*h*)—"The heir of line has right to the heirship moveables, and excludes all other heirs therein. Heirship moveables are the best of each kind of moveables, which is given to the heir because he is excluded from all other moveables."(*i*)

32. Heir of Conquest.(*k*)—"An heir of conquest is he who suc-

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(*y*) For rules in Stair see § 21; Erskine, § 40.

(*z*) And their descendants, § 253.

(*a*) Or sisters, §§ 254, 255.

(*b*) And their descendants, §§ 253, 254.

(*c*) For "them" read "him"—*i.e.*, the father.

(*d*) And sisters, § 260.

(*e*) And their descendants, § 260.

(*f*) For rules in Stair, see § 21; Erskine, § 43; Bankton, § 38.

(*g*) For rules in Stair, see § 30; Bankton, § 38; Erskine, § 46.

(*h*) Abolished since 31st July, 1868, § 237.

(*i*) For rules in Stair, see § 24; Erskine, § 51; Bell, § 73.

(*k*) Conquest abolished since 1st Oct. 1874, §§ 236, 257.

ceeds to the defunct in lands and other heritable rights to which the defunct did not himself succeed as heir to his predecessors."(*l*)

II. MOVEABLES.

33. Rules in Moveables.—"The same rules are observed in the succession of moveables that were formerly specified in the succession of heritage, except as to these particulars—viz., all of one degree succeed equally;(*m*) and so amongst brothers and sisters, the elder seclude not the younger, nor males the females, as in heritage; and in moveables there is no right of representation as in heritage;(*n*) and therefore, if there be a brother and two sisters alive, and a third sister's children, the brothers and sisters who are living will succeed equally, excluding the children of the sister who is dead."(*o*)

34. *Jus Relictæ.*—"If a man be married, the wife has without paction a share in his moveables, of which he cannot defraud her by his testament, and this is called *Jus Relictæ*;(*p*) and if there be children, the law has provided a portion of the moveables for them, which is therefore called their legitim,(*q*) and of which their father cannot prejudge them by his testament; but there is no legitim due by the mother's death;(*r*) nor have children who are *forisfamiliat* (that is to say, who are married,(*s*) and have renounced their portion natural), any legitim due to them. This legitim is also due only to the immediate children, but not to grand-children."(*t*)

35. Dead's Part.—"The remainder of the defunct's moveables, besides what is due to the relict and children, is called the dead's part;(*u*) and upon that only he can dispone. If a man have no

(*l*) For rules in Stair, see § 25; Erskine, §§ 49, 50; Bell, § 71.

(*m*) This is not so now; next-of-kin may be in different degrees, §§ 84, 125.

(*n*) There is now representation in the descending and collateral lines, § 125.

(*o*) Not so now, § 125. There are now also other exceptions to the above rules—*e.g.*, the father takes one-half, and failing him, the mother one-third, preferably to brothers and sisters. Uterine brothers and sisters and their issue take also one-half preferably to uncles- and aunts-german, § 129. For rules in Stair, see § 19; Bankton, § 38; Erskine, § 53; Bell, § 72.

(*p*) See §§ 91-98.

(*q*) See §§ 100-113.

(*r*) Legitim is now payable out of mother's moveable estate, § 113.

(*s*) Marriage is not a condition of forisfamiliation, § 118.

(*t*) For rules in Erskine, §§ 55, 58, 59.

(*u*) See § 114.

wife nor bairns all is the dead's part, and may be disponed by him. If there be either wife or bairns, and not both, then the defunct's testament receives a bipartite division; but if there be both wife and bairns, then it receives a tripartite division."(*v*)

36. Collation.(*w*)—"The heir has no share in the moveables except he collate (and be content that the rest of the children share equally with him in all that he can succeed to as heir), or in case there be but one child, for then that child is both heir and executor without collation."(*x*)

Bankton Institutes.

37. Estimate of his Work.—In 1751-53, Lord Bankton published his three folio volumes titled "Institute of the Law of Scotland." The work is abnormally lengthy, and of a discursive and speculative nature. In treating of succession, he begins by explaining in detail how the law is founded on the presumed will of the dead party; that the term "heir" in a strict sense is applied to the successor in heritage, and executor to the successor in moveables; that the heir succeeds to the immoveable property, and the executor to the moveables; that the right of representation takes place only in heritage,(*y*) and that in heritage males exclude females in the same line of succession, but in moveables all in the same degree succeed alike;(*z*) that in both heritage and moveable succession the whole blood excludes the half-blood in the same line of succession; that brothers and sisters are considered as descendants,(*a*) and therefore preferab to the lineal ascendant line; that the mother and her relations never succeed either in heritage or moveables,(*b*) but that one succeeds to his mother, and to such relations as she could succeed to; that in moveables any of the nearest-of-kin renouncing(*c*) makes way for the rest in the same

(*v*) The husband and children have now indefeasable rights in the wife and mother's moveable estate on her death, §§ 99, 113. For rules in Erskine see § 57.

(*w*) See §§ 120-123.

(*x*) For rules in Erskine see §§ 63, 64; Bell § 73.

(*y*) This now altered, § 125.

(*z*) Next-of-kin may now be in different degrees, §§ 84, 125.

(*a*) Brothers and sisters are collaterals, § 129.

(*b*) In moveables, mother, failing the father, takes one-third preferably to the brothers and sisters, and brothers- and sisters-uterine and their issue take one-half preferably to uncles or aunts, §§ 87, 88.

(*c*) This applies to the renunciation by children of legitim.

degree, and then, after explaining the lines and degrees of propinquity in order to succession, he gives the following :—

38. Special Rules of Succession in Heritage and Moveables. —"From the observations hitherto made,[1] it appears that the lineal succession with us, in both heritables and moveables, is:—(1.) The descendants in the remotest degree exclude ascendants and collaterals.(*d*) (2.) That brothers and sisters succeed next to descendants.(*e*) (3.) Failing those, and their issue lawful, the immediate ascendant succeeds. (4.) The immediate ascendant's collaterals. Thus, the father succeeds to his child, failing the child's descendants, and his brothers and sisters by the father and their issue;(*f*) and next to the father,(*g*) his brothers and sisters, the deceased's uncles and aunts, and their issue lawful;(*h*) and failing those, the grandfather by the father, and after him the grandfather's brothers and sisters, and their issue succeed; and so backwards to the most antient predecessors, the collaterals of the immediate progenitor always barring the remoter predecessor and his collaterals. This is founded upon the same reason that brothers and sisters exclude the father(*i*)—viz., that it is presumed the right came from the father, and the same affection to continue to all his children. (5.) That the whole blood always excludes the half-blood in the same line of succession. Thus brothers- and sisters-german and their issue exclude brothers-consanguinean; but a brother-consanguinean bars the father, or his brothers and sisters, though of the whole blood.(*k*) (6.) That the mother or any relations by her never succeed; so that there will be place for the king as last heir, in preference to one's mother, brothers- or sisters-uterine,(*l*) though children succeed to their mother, and such relations to whom she herself

(*d*) Doctrine of representation applies, §§ 125, 245.

(*e*) In moveables, father and mother take as in note (*o*), § 33, by Statute preferably to brothers and sisters. In heritage in the case of a middle brother dying, his younger brothers and their issue succeed first, and failing them, his elder brothers and their issue in inverse order, § 253.

(*f*) See note (*e*). In both estates brothers- and sisters-consanguinean and their issue come after brothers- and sisters-german and their issue, and before the father at common law, §§ 129, 259.

(*g*) Brothers- and sisters-uterine and their issue take one-half of moveable estate preferably to his brothers, &c., as in text, § 129.

(*h*) Uncles- and aunts-consanguinean come in here, § 129.

(*i*) At common law. See exceptions in note (*o*), § 33.

(*k*) See note (*o*), § 33, for exception in moveables.

(*l*) See note (*b*), § 37.

[1] 3, 4, 28.

could succeed. Lastly, That there is no succession by affinity.(*m*) Thus, the husband and wife never succeed to one another,(*n*) and much less can the relations of the one succeed to the other, or his relations.(*o*) The case was otherwise in the civil law by which, failing blood relations, the husband succeeded to the wife, and, on the contrary: but the relations of the one never succeeded to the other. And if the wife survived and was indigent, she succeeded to a certain proportion of the deceased's effects, by the law of the Novels, even though the deceased left children. . . . The diversity between the law of succession in heritage[1] and that of moveables with us is:—(1.) That in heritage, males bar females in the same line of succession, but not otherwise.(*p*) Thus sons exclude daughters: brothers exclude sisters; but sisters-german or consanguinean bar the father, and the collaterals to him. (2.) That in heritage, the right of primogeniture takes place among males; so that the eldest son and his issue exclude all the rest, and eldest brother the younger brothers, with the foresaid distinction as to a middle brother, that the succession divides between the heir of line and heir of conquest.(*q*) (3.) That in case of female succession in heritage, all of the same line(*r*) and the issue of the deceased inherit equally; thus, all the daughters succeed alike as heirs-portioners,(*s*) and all the sisters; first, german, and next, consanguinean. (4.) That in heritage there is place for the right of representation;(*t*) so that the great-grandchild of the eldest son will exclude the second son; and among the children of heirs-portioners, the eldest son succeeds in his mother's right, exclusive of the rest. But in moveables, as has been oft said, all of the same degree(*u*) and quality, male and female, come in alike.[2] . . . The foresaid line(*v*) of succession takes place

(*m*) This rule does not now hold absolutely. See §§ 88, 99.

(*n*) See note (*m*).

(*o*) Brothers- and sisters-uterine and their issue now take one-half preferably to uncles- and aunts-german, §§ 88, 129.

(*p*) Meaning not very clear: sons are in the first line, brothers in the second, and the father in the third. In the first and second lines, the doctrine of representation operates and enables a male to exclude a female in a nearer degree, §§ 245, 259. See § 84 as to degrees in succession.

(*q*) Conquest abolished, §§ 236, 257.

(*r*) Read "degree" for "line."

(*s*) The eldest heir-portioner entitled to certain privileges, § 247.

(*t*) So also now in moveables, § 125.

(*u*) Next-of-kin may now be in different degrees, §§ 84, 125.

(*v*) Read "order" for "line."

[1] 3, 4, 29.

[2] 3, 4, 30.

unless the rights are expressly provided to other heirs. This happens where one takes a 'right to himself and his heirs-male;' for then the heir-male succeeds, though in a remoter degree, in exclusion of a nearer heir-female and her issue; and, in this case the heir-male must connect his propinquity to the deceased by males. And the privilege of primogeniture and representation takes place here, as in all succession to heritage. An heir-male may be termed an heir of tailie: because the lineal succession is frequently thereby cut or set aside—viz., where the heir-male is not likewise the heir of line. But generally an heir of tailie is understood where one provides his estate to divers successive branches, limiting it 'to one and the heirs-male of his body, which failing, another and the heirs-male of his body,' and so on to such a series of heirs substitute as the tailier thinks proper; when all the branches of the tailie fail, it becomes a fee simple. Though heirs-male and of tailie are heirs of provision, yet more commonly heirs of provision are meant where there are not more branches, but the right is taken to one, and the heirs of such a marriage, and then they are likewise termed heirs of the marriage.[1] . . . The lineal succession in heritage takes likewise place amongst heirs of provision, so that the eldest son inherits lands provided to heirs of a marriage; but if it is a sum of money, it goes to all of them male and female as in moveables. It is otherwise if a sum of money is provided to heirs-male of a marriage; for then the eldest son of the marriage succeeds as heir of provision to the whole; because, amongst males, the eldest always takes without division."

Erskine's Institutes.

39. Estimate of his Work.—The next legal work of note is the Institutes of Professor Erskine, which were published in 1773. This is undoubtedly the law book most read and referred to at the present day, excepting, perhaps, the later works of Professor Bell. It stands as a sort of land-mark in our juridical literature. It states the law clearly, fully, and yet tersely.

Erskine was born in 1695, and was called to the Bar in 1719, but "did not succeed as a practitioner of the law." In 1737 he was appointed Professor of Scots Law in Edinburgh, and retained the appointment for 28 years. In 1754 he published his "Principles

[1] 3, 4, 31.

of the Law of Scotland," and on his retirement from the Professorship in 1765, he devoted his time to the preparation of the Institutes, but the work was not published until five years after his death, which occurred in 1768.

As to heritable succession he says[1]:—

"Succession in regard to its subject is either of heritage(*w*) or of moveables. . . . Heritable rights descend by succession to the heir;(*x*) for though the executors to whom the moveable succession falls are sometimes called the heirs in moveables, yet he only is heir in the most proper sense who represents the deceased in his heritable rights."

40. Order of Legal Succession in Heritage.—"The heirs pointed out by law succeed to the deceased in the following order:[2]—(1.) Descendants in the first degree. The three lines of propinquity—viz., of ascendants, descendants, and collaterals—have been already described, and the nature of degrees of propinquity explained.(*y*) The preference given to the line of descendants in the article of legal succession is established by nature itself and confirmed by the universal consent of nations, as well as by the authority of the Sacred Text, which makes the right of succession to be consequent upon the relation of a child. It is not so clear whether, in a competition among descendants themselves, sons ought, by the natural rule of preference, to have a larger share than daughters, or whether the eldest son should be regarded above the rest. By the Roman Law the succession of the father's whole estate was divided equally among all the immediate descendants of the deceased, whether sons or daughters, but it may be safely affirmed that the preference of the sons before daughters in heritage is, at least, not adversary to the law of nature, since the judgment given by God Himself in the case of the daughters of Zelophehad(*z*) is grounded on the supposition that daughters have no claim to the inheritance of the father while sons exist. By the law of Scotland also, sons are preferred to daughters in the succession of heritage;(*a*) one reason of which may be deduced from the first feudal maxims which subjected all pro-

(*w*) Heritage defined, § 235; moveables, § 83.
(*x*) See § 242.
(*y*) See §§ 84, 259.
(*z*) Num. xxvii. 6-8.
(*a*) See § 259.

[1] 3, 8, 3.
[2] 3, 8, 5.

prietors of land to military service.(*b*) This rule had at first the effect of excluding females in every case where there was no special destination in their favour ;(*c*) and though daughters succeed by our later customs in feudal rights where there are no sons, yet the original rule continues to have this effect, that where sons exist they are preferred before daughters. In the case of daughters only, they succeed equally and are called heirs-portioners."(*d*)

41. Right of Primogeniture in Great Force in Scotland.[1]—"Though by the law of Moses the eldest son's right of primogeniture over the rest was but partial, extending only to a double portion, it has been from our most early times considered as total by the usage of Scotland, so as to exclude the younger sons from the least share of the heritable succession.(*e*) This was originally made part of the feudal plan out of favour to superiors, that they might not be in danger of losing their vassals' services, by the fees being divided into small parcels; and was soon after adopted into our law with universal approbation as the most effectual expedient for perpetuating the dignity and influence of great families, and for the security and defence of our country in the times of public trouble. All heirs *ab intestato* succeed according to the proximity of their several degrees,(*f*) under the exceptions to be hereafter mentioned,(*g*) so that a grandson cannot succeed to a grandfather while his immediate father is alive. In default of immediate descendants, grandchildren succeed, and upon their failure great-grandchildren and so *in infinitum;* still preferring males before females, and the eldest male before the younger."(*h*)

42. Succession of Ascendants.[2]—"If the law of nature be considered abstractly, ascendants ought to have the next place in the legal succession after descendants; for though it is not conformable

(*b*) The feudal system was established by William the Conqueror. Under it the ownership of nearly all lands was vested in the Crown, and all those lands were held under the Crown by military tenure. This tenure was abolished by 20 Geo. II. c. 20, Bell's Prin. § 681.

(*c*) This is not borne out by the Rules in the Reg. Mag. See § 5.

(*d*) The elder daughter being entitled to certain privileges, § 247. For rules in Stair see §§ 20, 21 ; Mackenzie, §§ 28, 29 ; Bankton, § 38 ; Bell, § 70.

(*e*) See §§ 2, 3.

(*f*) See §§ 259, 260.

(*g*) See § 46.

(*h*) The right of the heir may be burdened with terce or courtesy, §§ 261, 264.

[1] 3, 8, 6.

[2] 3, 8, 7.

to the order of nature that parents should outlive their children, yet when that case happens they ought not to be deprived of the sorrowful comfort, as it is expressed in the Roman law, of succeeding to their own issue, nor to suffer at the same time the loss both of their children's person and of their goods.(*i*) The first feudal law did, however, in no case admit ascendants to the succession. For which Cujacius assigns this reason: That feus were originally granted only *posteris* to descendants, and therefore in their default returned to the granter. This was also agreeable to the ancient usage of Scotland. And Craig assures us that the first instance in which a service was attempted by a father as heir to his son was towards the middle of the 16th century, in the case of the Earl of Angus, who had put his son in the fee of his estate, and, after his son's death, wanted that it should return to himself. Yet this is certain that by our later customs, which seem more agreeable to the natural law, fathers are every day served heirs to their children without opposition.(*k*) Ascendants, though they be capable of succeeding by our present practice, yet come not immediately after descendants, for in default of children of the deceased his brothers and sisters are preferred to the father, for which Stair gives this reason (*l*): That as such fees proceed for the most part from the father, and as these brothers and sisters are the father's own issue equally with the deceased himself, paternal affection is presumed to operate as strongly for them as for the deceased."(*m*)

43. Succession in Heritage of Collateral Brothers- and Sisters-German, Uterine excluded.[1]—"These brothers and sisters succeed in the following order: Brothers-german have the first place; that is, brothers both by the father and mother. But as, by the law of Scotland, the legal succession of heritage is not divided, except in the special cases to be soon explained,(*n*) the brother-german next youngest to the deceased succeeds to him as heir-at-law according to the natural rule, *heritage descends.* Where the deceased is himself the youngest brother of three or more, the succession goes

(*i*) In the Reg. Mag. no account is taken of the father in heritable succession, § 10.

(*k*) In Stair's time, parents succeeded next to intestate's collaterals, § 23.

(*l*) § 23.

(*m*) For rules in Stair, see §§ 21, 23; Mackenzie, § 28; Bankton, § 28; Bell, § 70.

(*n*) § 48.

[1] 3, 8, 8.

to the immediate elder brother, and not to the eldest of all; because where there is no room for heritage to descend, which is its natural course, it is the least deviation from the rule that it ascend not *per saltum* but by the slowest degrees. If there are no brothers-german, the sisters-german succeed equally as heirs-portioners,(*o*) though there should be brothers-consanguinean—*i.e.*, by the father only; for even a sister by the full blood excludes a brother by the half-blood. In default of sisters-german, brothers-consanguinean succeed one after another, in the same order as brothers-german;(*p*) and in default of these also, the sisters-consanguinean take the succession equally as heirs-portioners. Brothers or sisters of the deceased by the mother only, who are called uterine, are by the law of Scotland incapable of succession either in heritage or in moveables;(*q*) which, indeed, is the case of all cognates—*i.e.*, relations of the deceased by the mother.(*r*) This doctrine, at least as to succession in heritage, may be deduced from the choice or *delectus* of a special family made by the superior in his feudal grant, which would be elided if the fee were descendible to the kinsmen of the mother, whom the law considers as of a different family from the vassal."(*s*)

44. Order of Succession of Ascendants in Heritage. The Mother cannot Succeed to her Child.[1]—"If the deceased leave neither child, brother, nor sister,(*t*) the succession mounts upwards to the father, as the only ascendant in the first degree capable to succeed;(*u*) for the mother, though an ascendant in the same degree, is as incapable of succeeding to her child as any of the child's relations by the mother are.(*v*) If the father be already dead, the succession goes to the father's brothers, and in default

(*o*) Indivisible rights go to the eldest heir-portioner, § 247.

(*p*) Each member in every case as he succeeds, transmitting to his issue, first sons in their order, then daughters equally, §§ 46, 259.

(*q*) In moveables, brothers- and sisters-uterine, and their issue, take one-half preferably to uncles and aunts, § 87.

(*r*) Rule now modified as regards moveables, see § 88.

(*s*) See §§ 253, 254, 259. For rules in Reg. Mag. see § 10; Stair, § 21; Mackenzie, § 29; Bankton, § 38; Bell, § 70.

(*t*) German or consanguinean, or any issue of such, § 254.

(*u*) If the deceased leave a wife, she takes terce, § 261; if a husband and father of an heir, he takes courtesy, § 264.

(*v*) See note (*r*).

[1] 3, 8, 9.

of them to his sisters,(*w*) in the same order in which it would have gone to the brothers and sisters of the deceased if he had had any. On the failure of these it ascends to the father's father, and if he be not alive, to his brothers and sisters;(*x*) and so upwards, the brothers and sisters of the nearest ascendant still excluding the more remote and his collaterals. Where there is no agnate or kinsman to the deceased by the father, the king succeeds as *ultimus hæres*."(*y*)

45. Consequences from the Rules of Succession in Heritage above laid down.[1]—"Upon the rules above set forth it may be observed:—1st, That though a mother cannot succeed to her child, yet a child is as truly heir to the mother as to the father. 2ndly, The rule that the full blood excludes the half-blood holds only in the same line of succession. Thus, though a brother-german excludes a brother-consanguinean, because both are in the collateral line, yet a brother-consanguinean is preferred to the father's full brother, because these two are in different lines.(*z*) 3rdly, No regard is had to the question, From what quarter the estate of the deceased has come? If the right appears to be once vested in the deceased,(*a*) the only remaining question is, Who is his heir at law? without considering whether such heir stands related to him from whom the estate descended to the deceased. The contrary rule *Paterna paternis et materna maternis* obtains in England; and, in the opinion of *Craig*, ought also to obtain universally, on account of its equity, where the estate proceeds from an heiress; yet he admits that our supreme court rejected it in the case of one Gilbert; and a similar decision has been pronounced since Craig's death, by which a father was preferred to the succession of his son in lands in which the son was infeft as heir to his mother, to the exclusion of the brother-uterine of the deceased from that very estate which belonged to his own mother. Before going farther, we may men-

(*w*) Both german and their issue, and failing them, to brothers- and sisters-consanguinean and their issue, § 254.

(*x*) German and consanguinean, and their issue, in their order, §§ 253, 254.

(*y*) For rules in Reg. Mag. see § 10; Stair, §§ 22, 23; Mackenzie, § 29; Bankton, § 38; Bell, § 70.

(*z*) Lines of succession defined, § 84.

(*a*) Vesting now takes place without service, 37 & 38 Vict. c. 94, § 9 (1874).

[1] 3, 8, 10,

tion, as an universal rule in every country, that the succession to land, estates, and all heritable subjects(*b*) must be governed by the law of the kingdom or state where they are situated, and not according to the *lex domiciliii* of the proprietor, though he should happen to die abroad and have his settled residence there at his death."

46. Right of Representation in Heritage.[1]—"There is a right of representation peculiar to heritage,(*c*) by which one succeeds in heritable subjects, not from any title in his own person, but in the place of, and as representing some of his deceased ascendants.(*d*) Thus, where one dies leaving a younger son and a grandchild, whether male or female, by an elder son predeceased, the grandchild, though farther removed in degree from the deceased than his uncle, excludes him(*e*) from the legal succession; because he succeeds not in his own right but in that of his father, who was the eldest son of the deceased, and as such would have excluded the younger son had he been alive when the succession opened to him(*f*) upon his father's death. The word *representation*, when applied to this right, must not be understood in that sense in which it is commonly taken by lawyers, as if the grandchild in the case now stated were liable for the debts of his immediate father, whom he represents; he represents him barely in his propinquity and not in his debts.(*g*) This right obtains in the succession of collaterals as well as in that of descendants;(*h*) and therefore, where it is said that brothers succeed next after descendants, then sisters, &c., not only the persons themselves are meant, but all their descendants *jure representationis*. Thus, if one die without issue, leaving a nephew by his immediate younger brother deceased, and also two elder brothers, the surviving brothers will be excluded from the succession, though next in degree, and the nephew preferred, as

(*b*) Many of the distinctions between heritable and moveable property are purely artificial, and in some cases—*e.g.*, Bonds—the question is solved by the character or position of the successor, see §§ 83, 235.

(*c*) Representation now admitted among descendants and certain collaterals in moveables, § 125.

(*d*) Ascendants being the third line in succession—"ancestors" a better term here.

(*e*) *I.e.*, the uncle.

(*f*) Omit "to him." See § 245.

(*g*) Heir not now liable for ancestor's debts beyond value of estate to which he succeeds, §§ 269, 270.

(*h*) Same in moveables, § 125.

[1] 3, 8, 11.

coming in the place of his deceased father. Thus also, as a sister-german excludes a brother-consanguinean, so does a child of that sister exclude him *jure representationis.*(*i*) By the same rule, though no heritable right falls in any case to the mother of the deceased, nor to his relations by her, yet as children take by succession the heritage belonging to their deceased mother, they also succeed as representing her, in every case where the mother herself would have been entitled to the succession had she been alive at the death of her ancestor."(*k*)

47. Succession *in Capita* and *in Stirpes*.[1]—"From this doctrine arises a division of succession, well known in the Roman Law, into succession *in capita* and *in stirpes*. The succession *in capita* is that which divides the inheritance into as many equal parts as there are *capita* or heirs ; as in the case of daughters only, who are all of them entitled to equal parts of the father's succession.(*l*) Succession *in stirpes*, or by the stock, makes the partition not according to the number of heirs to whom the estate descends, but according to the number of the stocks or *stirpes* from whom these heirs derive right. Thus, if a father die leaving one daughter behind him, and two daughters by a daughter predeceased, the surviving daughter is entitled by herself to the half of the whole heritage as one of two daughters co-heiresses, while each of the two granddaughters take only a half of their mother's half, or a fourth of the whole."(*m*)

48. Succession of Heirs-Portioners. *Præcipuum* to the Eldest of the Mansion-House and Garden. Patronage Divisible.[2]—"In the succession of heritage *ab intestato*, the law in special cases does not confer the whole heritable subjects belonging to the deceased upon a sole heir, but divides the succession into parts among two or more.(*n*) Thus—1st, where females succeed, it has been said that the eldest does not by any right of primogeniture exclude her younger sisters, but that they succeed equally as heirs-portioners. In female succession by the line of descendants, all the

(*i*) The contingent right of terce or courtesy may also arise, §§ 261, 264.

(*k*) For rules in Reg. Mag. see § 9 ; Stair, § 22 ; Mackenzie, § 30 ; Bankton, § 38 ; Bell, § 70.

(*l*) See next section as to indivisible rights.

(*m*) See the operation of this rule in moveables, § 125.

(*n*) See note (*i*).

[1] 3, 8, 12.

[2] 3, 8, 13.

daughters of the deceased succeed in this manner, though they should be procreated of different marriages, if there be no special destination by the father to the contrary. But though each heir-portioner has an equal interest in the succession, in so far as it is divisible, yet the eldest daughter enjoys this privilege from necessity, that rights which are indivisible *ex sua natura*, fall to her alone—*e.g.*, titles of dignity. . . . Where the deceased happened to be vested with one single superiority, the right of it goes to the eldest: not so much because a right of superiority is hardly capable of division, as because the condition of a vassal is not to be made worse by splitting the superiority into parts; for no vassal can be compelled to hold his lands of two or more superiors in the place of one. Where different superiorities were vested in the deceased, the eldest would probably have the option or election of what she judges best, then the second, and so in their order, till all the superiorities be exhausted. Craig is of opinion that in the superiority of lands holden feu, the feu-duties, being a constant yearly rent, ought to be deemed part of the property rather than of the superiority; and consequently to be divided among the heirs-portioners even in the case of a single superiority. But, in truth, feu-duties are proper parts of the superiority, and the only title for poinding the ground for the arrears is the right of superiority; so that, if the yearly feu-duty were divided among the sisters, as Craig would have it, it is only that part of it which remains with the eldest that would be *debitum fundi*, since she only as superior could poind the ground for its payment. But though feu-duties cannot, for this reason, suffer a separation from the right of superiority, yet because they are a fixed yearly rent, and so of a different nature from the casualties of superiority, which depend upon accidents, the younger sisters have compensation for their shares of them out of the other estate of the deceased, in so far as the division of the several superiorities hath been unequal.(*o*) The principal mansion-house of the lands is accounted an indivisible right; but because that subject admitted of valuation, our old law directed that the younger sisters should be recompensed out of the deceased's other estate, to the amount of its value. But by our later customs the eldest is entitled to it, even without recompense to the other sisters, as she

(*o*) It is now settled that superiorities yielding substantial feu-duties fall to be divided, but the eldest heir-portioner is entitled to a blench superiority as a *præcipuum* without recompense to the others, Edition 1871, p. 902.

is also to the garden and orchard belonging to it, since the one ought not to be separated from the other.(*p*) Upon this ground, the heirship moveables(*q*) fall also to the eldest alone, for the right of these ought to accompany that of the mansion-house. Houses within borough, especially if they lie discontiguous from the other estate of the deceased, and all country houses except the principal mansion-house, are accounted common pertinents of the ground on which they stand, and are therefore equally capable of division with the lands themselves. Patronage is a divisible right,(*r*) for our statutes admit that the patronage of the same church may be vested in two different persons, 1617, c. 3. It carries also a patrimonial interest to the patron, 1619, c. 23,(*s*) and upon both accounts it divides equally among the sisters, who may present to the benefice and levy the vacant stipend by turns, the first *vice*, or turn, falling to the eldest. As the title-deeds of an estate cannot be in the custody of two different persons, the eldest sister is preferred to the keeping of them, who may be compelled to give transumpts to any of the other sisters that may have occasion for them, she herself bearing an equal share of the expense."(*t*)

49. Heirs of Conquest.[1]—"The legal succession of heritage is also broken into parts, in the case of an heir of conquest . . . the terms by which this division is expressed in our law are fees of heritage and fees of conquest;(*u*) so that heritage thus limited includes not all heritable subjects without exception, but is confined

(*p*) *Præcipuum* held to extend to mansion-house, offices, barn-yard, and garden. Estate divisible by sheriff; the eldest heir-portioner receiving that part where the house and its pertinents are situated; the others cast lots for remaining parts, Edition 1871, p. 903.

(*q*) Heirship moveables abolished, § 237.

(*r*) Church patronage abolished or transferred to congregations by 37 & 38 Vict. c. 82 (1874).

(*s*) These references appear to be inaccurate. Patronage was first recognised and regulated by 1567, c. 7; 1592, c. 110; 1612, c. 1. It was abolished by 1649, c. 23, and 1690, c. 23; was restored by 10 Anne, c. 12, and again abolished as in preceding note.—Barclay's Digest.

(*t*) The right of the eldest heir-portioner to præcipuum is excluded except where she succeeds by disposition of law. No room for the claim where the parties succeed as joint disponees. *Denniston*, 17th June, 1830. For rules in Reg. Mag. see § 5; Mackenzie, § 26.

(*u*) Distinction between heritage and conquest abolished as to all successions opening after 1st Oct. 1874, § 236.

[1] 3, 8, 14.

to those to which the deceased himself succeeded as heir. Besides other differences between the two branches of this division, their rules of legal succession are different. The law confers the *antiqua feuda*, or proper heritage of the deceased, upon one heir, and his conquest upon another.(*v*) This distinction obtains only where two or more brothers or uncles, or their issue, are next in succession. Rights that are heritable in the most strict and limited sense descend in this case to the next younger brother of the deceased, or to the next younger brother of the father of the deceased, where there are no nearer heirs as to the proper heir of line, conformably to the above-mentioned rule, heritage descends; but the succession of conquest—*i.e.*, of such heritable rights as had been acquired by the deceased himself—ascends to the immediate elder brother or uncle, who is therefore called the heir of conquest, because his right of succession is confined to the subjects which the ancestor himself had thus acquired, or, as we long expressed it, conquished by some singular title. This doctrine has been probably introduced with the view of enriching elder brothers, who have been always more favoured by our law than the younger. Where the deceased is the youngest brother, and leaves two elder, whether they be procreated of the same or of a former marriage,(*w*) the youngest of the surviving brothers is not only heir of line to the deceased but his heir of conquest, because he is his immediate elder brother, contrary to the opinion of Craig, who affirms that if the surviving brothers are only consanguinean, procreated of a former marriage, the eldest of them is heir of conquest to the deceased. Without all doubt, where the deceased leaves but one brother whether elder or younger than himself, he is heir both of line and of conquest."(*x*)

50. Succession to Conquest among Females. What accounted(*y*) conquest.[1]—"There is no place for this distinction between heritage and conquest where the succession divides among sisters, for seeing sisters do not succeed in heritage, as brothers, one after another, but as heirs-portioners, conquest goes in the same way without any preference in favour of the immediate elder sister. Conquest can ascend but once; or, in other words, where one who has himself acquired an estate dies, such estate, though it must go to the

(*v*) See rules, § 257.

(*w*) The full blood excludes the half blood, § 257; Bell's Prin. § 1671.

(*x*) For rules in Stair see § 25 Mackenzie, § 32; Bell, § 71.

(*y*) See § 236.

[1] 3, 8, 15.

immediate elder brother as heir of conquest, does not continue conquest in the person of that brother; because it was no acquisition of his; he succeeded to it as heir; and therefore if, upon his death he should leave an elder and a younger brother, the estate does not as conquest ascend to the elder, but must descend to the younger as heir of line.(*z*) An heritable subject made over by a father to his eldest son, who is at the date of the right *alioqui successurus*, is not conquest in the person of the son, because he would have succeeded to it as heir, though there had been no disposition, and consequently if the son die after his father leaving two uncles, one elder than the father and the other younger, the subject will descend to the younger as heir of line. But an heritable grant by one, who has no lawful issue, in favour of a brother, ought to be accounted conquest in the grantee, unless the grant has been expressly made over to him as the granter's successor. For though the disponee was at the date of the right the disponer's presumptive heir, the disponer might have afterwards had issue of his own body, who would have been nearer in blood to him than the disponee."

51. Heirship Moveables.[1]—"The heir of line is entitled, not only to the succession of subjects properly heritable, but to that sort of moveables called heirship.(*a*) By heirship moveables are understood(*b*) the best of certain kinds of moveable goods from which the executor, though he be the heir in moveables, is excluded, and which the law accounts heritage in respect of succession from the presumed intention of the deceased, that is, principal dwelling-house, and the farm which he kept in his own natural possession for the use of his family, might go to the heir not quite dismantled by the executors. . . . As this is a right annexed to succession in heritage, the heir cannot be deprived of it by any deed of the ancestor, either testamentary or on death-bed,(*c*) but it is the heir

(*z*) But if an heir of conquest died without making up a title, he would be succeeded by the next heir of conquest of the ancestor, Edition 1871, p. 904.

(*a*) This right abolished as to all successions opening after 31st Dec. 1868, § 237.

(*b*) An amusing list of heirship moveables is given in Hope's "Minor Practicks," Edition 1734. See also *Oliphant*, 24th Dec. 1859; *Leith*, 19th June, 1863; see also next section.

(*c*) Bell states that the heir's right is protected by the law of death-bed, Bell's Prin. § 1908. Law of death-bed abolished by 34 & 35 Vict. c. 81 (1871).

[1] 3, 8, 17.

of line who alone can claim it, and therefore, though the whole estate of the deceased should be conquest or entailed to heirs-male, the heirship does not accompany such estate, but belongs solely to the heir of line. Where the legal succession descends to two or more females who are heirs-portioners of line, the eldest only is entitled to the heirship.(*d*) . . ."

52. What is included under Heirship Moveables.[1]—"The act establishing heirship moveables is 1474, c. 54, and it refers to the Borough Laws for the catalogue of the particulars included under that appellation (L. Burg. c. 125). But all lists of heirship moveables must, in the nature of things, be imperfect, and increase with every new piece of furniture which the vanity or taste of a proprietor may add to a house or farm.(*e*) This, however, may be observed after Stair, that by the words of the statute, *the best of everything*, we must not understand fungibles, which are estimated by quantity, as coin, wine, uncut cloth, bullion, &c., for heirship consists only of subjects *quæ non recipiunt functionem* as beds, grates, tables, chairs, mirrors, plate, bed and table linen or other such household stuff. And in like manner, in what is called *outside plenishing*, or moveables without doors, the heirship may be drawn of horses, cows, oxen, and of all the implements of agriculture, as ploughs, harrows, carts, &c., but not of corn or hay, because those last are fungibles. In moveable subjects, which go by pairs or dozens, as in table plate, bed and table linen, &c., the best pair or dozen is the heirship, and, for the same reason, where the deceased had any number of cattle proper for tillage, the heirship is the best yoke—*i.e.*, as many as make a plough. There are some particular kinds of moveables which fall under heirship though the heir should be but one individual of that kind belonging to the deceased, as the family's seal of arms, the carpet or cushion belonging to the seat in the church, and, by our ancient practice, the whole furniture of the hall."

In regard to moveable succession, Professor Erskine says :—

53. Rules of Moveable Succession.[2]—"The order of succession(*f*) in moveables *ab intestato* is the same as in heritage, with the following limitations or exceptions: 1st, It is an universal rule

(*d*) This controverted by Bell, Bell's Prin. § 1906. For rules in Stair see § 24; Mackenzie, § 31; Bell, § 73.

(*e*) See note (*b*).

(*f*) See statement in § 129.

[1] 3, 8, 18.

[2] 3, 9, 2.

in the legal succession of moveables, that the next in degree of blood to the deceased, or the next-of-kin,(*g*) succeeds to the whole; and if there be two or more equally near, all of them succeed by equal parts,(*h*) without the prerogative which males enjoy above females in the succession of heritage, or any right of primogeniture in the eldest male above the younger. 2nd, The right of representation in heritage, by which remoter heirs represent their ascendants, has no place in the succession of moveables. Thus, where one dies without issue leaving two sisters, and a nephew or niece by a third sister deceased, the two surviving sisters succeed to the whole moveable estate, excluding the child of the sister predeceased; and in the same manner, immediate children surviving exclude the grand-children by a child predeceased.(*i*) Yet in questions between the full and the half-blood, representation is admitted, even in moveables. Thus, where one deceased leaves a sister consanguinean, or by the father only, and a nephew by a sister-german, or full sister predeceased, the nephew, though more removed by one degree from his uncle than the sister by the half-blood, shall take the whole moveable succession, as representing his mother, who was sister to the deceased by the full blood."(*k*)

54. The Heir who Succeeds to the Heritage has no Share in the Moveables.(*l*) **Collation by the Heir.**[1]—"Where the estate of the deceased consists partly in heritage, and partly in moveables, the proper heir in heritage has no share of the moveable estate, if there be others as near(*m*) in degree to the deceased as himself. Thus, in the line of descendants, the eldest son gets the whole heritage;(*n*) and all the other children, whether sons or daughters, divide the moveable estate among them *in capita*.(*o*)

(*g*) Next-of-kin may now be in different degrees, §§ 84, 125.

(*h*) To this rule there are now these exceptions:—Failing descendants, the father takes one-half, and failing him, the mother one-third, of the free succession (*i.e.*, after deducting debts and *jus relictæ*, if any), preferably to collaterals of the intestate; and brothers- and sisters-uterine and their issue take one-half preferably to the intestate's uncles and aunts. §§ 128, 129.

(*i*) This right is now admitted among the descendants and certain collaterals of the intestate, § 125.

(*k*) For rules in Reg. Mag. see §§ 11, 12, 13; Stair, § 19; Mackenzie, § 33; Bankton, § 38; Bell, § 72.

(*l*) See § 120.

(*m*) Or nearer, §§ 123, 245; unless he collates, § 120.

(*n*) Subject to contingent rights of terce or courtesy, §§ 261, 264.

(*o*) If one or more of the younger children be dead, leaving issue, the division is *per stirpes*, § 125.

[1] 3, 9, 3.

Thus also, in the collateral line, that brother, who, as heir-at-law, is entitled to the whole heritage, is excluded by his other brothers and sisters from any share of the moveable succession. But where the heritable estate of the deceased is so inconsiderable, in proportion to the moveable, that the heir finds it his interest to renounce his exclusive claim to the heritage, and betake himself to his right as one of the next-of-kin, the law allows him to collate or communicate the heritage with the other next-of-kin, who, in their turn, must collate the executry with him; so that the whole estate belonging to the deceased is thrown into one mass, and distributed by equal parts among all of them.(*p*) And even though the heir be not one of the next-of-kin—*e.g.*, if he be a grandson, by the eldest son of the deceased—he seems entitled(*q*) to the privilege of collating with the deceased's immediate children; for, since he succeeds to the heritage as representing his father, who was one of the next-of-kin to the deceased, he ought to enjoy all the privileges which would have been competent to his father as heir had he survived the grandfather.(*r*) Where the deceased leaves only one child, he is both heir and executor without collation;(*s*) for where the right of the whole estate, heritable and moveable, descends to the same person, there is no room for collating the one with the other. This kind of collation is admitted, not only in the succession of descendants, but of collaterals; so that a brother who succeeds as heir to the deceased, if he judges the moveable succession the most profitable of the two, may collate with his younger brothers and his sisters,(*t*) and so come in as equal sharers with them to the whole succession; for as collation was admitted into our law, that the heir might, in no event, be in a worse condition than the other next-of-kin, that reason has equal force in the succession of collaterals, and of descendants. It is only the legal heir, or the heir *ab intestato*, who

(*p*) Foreign heritage must be collated by an heir claiming a share of a Scotch executry. But where the executry is foreign, the Scotch law of collation has no place, Edition 1871, p. 990.

(*q*) The right is now given by statute, and may be exercised by heirs-portioners coming in place of the heir-at-law, §§ 120-123.

(*r*) The common law is stated fully in *Anstruther*, 20th January, 1836. By the recent statute, if the heir of a predeceasing heir does not collate, the other issue of the predeceasing heir are entitled to claim out of the moveable estate the difference between the value of the heritage and the share their parent would have taken on collation, § 123; also Intestacy Act, 1852, App.

(*s*) And not bound to collate with widow, § 123.

(*t*) Or other next-of-kin, § 129.

is thus obliged to collate the heritage with the other next-of-kin, in order to have the benefit of the moveable succession.(*u*) Where, therefore, in the case of daughters only, the heritable estate is settled on the eldest by an entail or destination, she is entitled, upon her father's death, to her just share of the moveables, with the other daughters, without collating that estate; for she succeeds to the heritage by the provision of the father, who had full power over it; and that provision can in no degree affect the moveable estate, which, by the legal succession, descends equally to her and her younger sisters.(*v*) . . ."

55. Who can make a Testament? No Testament can be made in prejudice of the *jus relictæ* or *legitim.*[1]—"All who are capable of consent may make a testament;(*w*) . . . but there are few who have so absolute a power over their estate that they can test upon the whole of it. Where a person has either wife or child, a certain portion of his moveable estate hath from our earliest times fallen upon his death to the widow, and a certain portion to the bairns or younger children, of which, therefore, he cannot dispose by will. The share belonging to the widow is called *jus relictæ*,(*x*) and that which falls to the children is sometimes, from the Roman Law, styled the *legitim*,(*y*) or the portion given them by the law, and sometimes their portion natural or bairn's part of gear. . . . From hence[2] it appears that the rights thus arising to the wife and children are truly rights of division of a common subject;(*z*) for so soon as the communion which is formed by the marriage ceaseth by its dissolution, the society goods fall to be divided. It is true that the interest of the wife in those goods, as well as that of the children, lies dormant during the husband's life, who, therefore, in

(*u*) The legal heir, even where he does not actually take *ab intestato* must collate every subject wherein he is heir *alioqui successurus*; however, he may take it if he wishes to collate. In the case of an heir of entail, he is bound to communicate only the value of his life interest; but in the case of a fee-simple heir, it would appear that he must convey the heritage, and not merely account for its value, Edition 1871, p. 991.

(*v*) This is correct where the heirs-portioners are sole next-of-kin; but where they are not so, the eldest heir-portioner succeeding as heir of entail must collate, Edition 1871, p. 991. For rules in Mackenzie, § 36; Bell, § 73.

(*w*) See § 78.

(*x*) See § 91.

(*y*) See § 100.

(*z*) These rights appear to be rights merely of debt against the husband's executors, § 89.

[1] 3, 9, 15.

[2] 3, 9, 16.

consequence of his superiority over the wife, and of his right of administrating for his children, can not only alienate them for a valuable consideration, but make a present of them to whom he will, provided the deed be not granted *in fraudem* of those legal rights."(*a*) . . .

56. *Legitim* is due only out of the Estate belonging to the Father at his death.(*b*) **To whom is it due ?**[1]—"No *legitim* can be claimed by children but out of the moveable estate belonging to their father at the time of his death, so that there is no room for it upon a mother's death(*c*) though she should survive her husband, not even out of that part of the goods in communion which she had received *jure relictæ* upon her husband's death, for her share of these became, upon the division, her own absolute property.(*d*) Secondly, Children who are forisfamiliated [*i.e.*, those who, by having already received from their father their share of the *legitim* and discharged it, or by their renouncing it without real satisfaction, are no longer accounted children in the family] are not entitled to *legitim.*(*e*) It is due to immediate children only, and not to grandchildren or remoter descendants, either because the law considers the *legitim* as a right so personal to the child himself that, unless he claim it during his lifetime, it falls by his death; or because a *presumtio juris et de jure* arises, from the immediate father not claiming it, that he had renounced it before his death upon receiving his just share of the effects of his father.(*f*) All the husband's children, of whatever marriage they may have been procreated, are equally entitled to a *legitim* on their father's death; for as children have no such claim on the death of their mother,(*g*) the children of former marriages would be entirely cut off if they

(*a*) By the Married Women's Property Act, 1881 (App.), after 18th July, 1881, the moveable estates of all married women remain vested in themselves as separate estates, and on their death their children are entitled to *legitim* and their husbands to a share corresponding in amount to what the *jus relictæ* would be from such estates, §§ 99, 114.

(*b*) *Legitim* is now payable out of the mother's separate personal estate, § 113.

(*c*) See note (*b*).

(*d*) The wife takes the *jus relictæ* only, § 91; but her own personal estate remains vested in herself, and on her death is subject to *legitim*, § 113.

(*e*) See § 104.

(*f*) This reasoning unsound. *Legitim* vests in child by survivance without confirmation, and so transmits to his next-of-kin, Edition 1871, p. 1007.

(*g*) See note (*d*).

[1] 3, 9, 17.

were not entitled to a *legitim* equally with the children of that marriage which was dissolved by the father's death."(*h*)

57. Dead's Part.[1]—"What remains over the *jus relictæ* and the children's *legitim* is the absolute property of the deceased, of which he has the free disposal, even to a stranger, not only in *liege poustie*, but by testament *etiam in articulo mortis;* and it is called the dead's part, because the deceased had full power over it.(*i*) Where a person has neither wife nor child, all his moveable estate is dead's part, and consequently may be devised by testament.(*k*) This dead's part, if it was not disposed of by will, was, by our ancient law (St. Gul. c. 22) committed to the care of the bishop of the diocese, or ordinary, who began about that time to be looked upon as the legal trustee of the moveables of deceased persons. The bishop, in the exercise of that trust, sometimes applied them to pious uses, and sometimes retained them to himself, to the exclusion of the next-of-kin, even when the deceased died in pupillarity, and so was incapable of making a will, or of discovering any purpose concerning his succession.(*l*) To put a stop to such illegal and oppressive practices, it was enacted by 1540, c. 120, that where one died so young that he was not capable of testing, his moveable estate should go to his next-a-kin; and this Act was soon extended by custom, with universal approbation to the case of persons of full age dying intestate."(*m*)

58. Division where one leaves a Widow and Children.[2]—"If one, upon his death, leave a widow and no children, the goods in communion(*n*) divide into two equal parts; of which one goes to the widow, and the other is dead's part. The words used in the language of our law for expressing this, are, that the testament(*o*) of the deceased divides in two; which, however, is improper; because

(*h*) For rules in Reg. Mag. see §§ 11, 13; Stair, § 19; Mackenzie, § 34.

(*i*) See § 114.

(*k*) The same when a person has neither husband nor child, § 114. See note (*m*).

(*l*) See § 14.

(*m*) The wife's moveable estate is also at her death subject to a claim by the husband corresponding to the *jus relictæ*, § 99, and also to a claim of *legitim* by the children, § 113; but it would appear that the residue or dead's part cannot be disposed of by her without the consent of the husband or the Court, 44 & 45 Vict. c. 21, App. For rules in Reg. Mag. see §§ 11, 13; Stair, § 19; Mackenzie, § 35.

(*n*) This term not now applicable, § 89.

(*o*) See § 11.

[1] 3, 9, 18.

[2] 3, 9, 19.

nothing ought to be denominated a testament but what may, at least, be the subject of a testament; in which sense it is the dead's part only which deserves that name, as that alone can be tested upon. If the deceased has left children, one or more, but no widow, the testament is also bipartite; for the children get one half as legitim, the other half is dead's part, which, if it be not actually tested upon, goes also to the children in the character of next-of-kin. If he leave both widow and children, though all his children should have been of a former marriage, the division is tripartite; the widow takes one-third by herself, another third goes to the children equally among them as legitim, and the remaining third is the dead's part. Nay, if he leave a widow, and but one child, who succeeds to his heritage, still the society-goods divide in three, because such only child is entitled to a legitim. Though the proper subject which falls to the heir is the heritage, the moveables being the fund intended by the law for providing the younger children, yet the heir's right of legal succession to his father's heritage cannot preclude him from his natural right, as the only child, to his father's moveable estate. Neither is the circumstance of his being an only child a reason for enlarging the widow's share from a third to a half."(*p*)

59. Where the Wife has renounced her *jus relictæ*.[1]—"When a wife, in her marriage contract, renounces her *jus relictæ*,(*q*) by the acceptation of a special provision in satisfaction or in full of it, such renunciation is considered, not as a conveyance of her third to her husband, so as to increase the dead's part from one-third to two-thirds. It has the same effect as her death, so as to make the husband's testament divide in two—the one half legitim and the other the dead's part. The reason is, the wife's right is not of the nature of a debt, which may be transferred by the wife to the husband, it is a right of division which takes no place till the dissolution of the marriage;(*r*) and as this right is extinguished by the pre-decease of the wife, because after her death she cannot be reckoned in the division, it must be also extinguished by her renunciation. A widow who has renounced cannot concur in the

(*p*) See Table under heading of this section, § 130. For rules in Stair see § 19; Mackenzie, § 34; Bell, § 72.

(*q*) See §§ 95-98.

(*r*) This reasoning controverted by Dr. Fraser, see § 89.

[1] 3, 9, 20.

division; and in every case where the widow cannot concur, the legitim is the half of the executry."(*s*)

60. Division where Wife predeceases.[1]—"Upon the dissolution of a marriage by the pre-decease of the wife without issue, the goods falling under communion(*t*) divide in two: the one half is retained by the surviving husband, who was one of the *socii*, and who, standing the marriage, had the absolute management of the whole; the other half, being the share falling to the wife, the other partner, upon the division of the society-goods, descends, as her absolute property, to her next-of-kin.(*u*) A bipartite division ought also to be made in a testament where the predeceasing wife leaves issue of the marriage; for it is certain there is no room for a proper tripartite division, except in the case of a legitim, and that is neither due to children out of the mother's effects, nor out of those of the father so long as he is alive.(*v*) Even in that case, however, the society-goods(*w*) are, by our practice, divided in three, in the same way as on the predecease of the father leaving issue.(*x*) Two thirds therefore remain with the surviving father, as if one of the thirds were due to him *proprio nomine*, and another as legitim, to the administration of which he is entitled for the behoof of his children; the remaining third, being the wife's share, divides *in capita* among her children, whether of that or any former marriage, for all her children are equally her next-of-kin.(*y*) The children of the last marriage appear entitled, if they are of perfect age, to insist against the surviving father for the present payment of their several proportions of the share falling to their deceased mother; for it falls to them, not as legitim—which is due only out of their

(*s*) Where the renunciation is made *after* the husband's death, this does not increase the *legitim* but the dead's part, § 98.

(*t*) See note (*r*). The wife's moveable estate does not now fall under the *jus mariti*. And on her death it is divisible like the husband's moveable estate, § 90.

(*u*) This right of the wife's next-of-kin was taken away by the Intestacy Act, 1855, see § 74. But see note (*v*) below.

(*v*) The wife's personal estate is now vested in herself, and on her death is subject to a claim by the husband corresponding to the *jus relictæ*, § 99, and to a claim by the children for legitim, § 113.

(*w*) This term not now applicable, § 89.

(*x*) See note (*t*).

(*y*) The wife's whole personal estate now divisible thus:—One-third to husband, one-third to children as *legitim*, and one-third to them as next-of-kin, §§ 114, 99, 113.

[1] 3, 9, 21.

father's moveables, and which they cannot demand till his death—but as their mother's share of the society-goods that, upon the dissolution of the marriage by her death, descends to her children in the way of succession.(*z*) Where the husband predeceases, neither widow nor children can claim a right in any part of the heirship moveables,(*a*) as goods falling under the communion, because those are truly appurtenances of the heritable rights which belong to the heir. But where the wife happens to die before the husband, her next-of-kin are entitled to a share of the whole moveables, without deducting any part as heirship, because heirship is a certain share of the moveable estate at the precise time of the death of the husband; and, therefore, while he is alive, he can have no heirship."(*b*)

61. What Debts affect the whole Executry, and what only the Dead's Part.[1]—"Nothing can be accounted executry but what is free, after satisfying all the debts due by the deceased; and therefore these must be deducted before any testament can be divided.(*c*) As the husband has the unlimited power of administration during his life, the debts contracted by him must be preferable to the rights both of the widow, the children, and the next-of-kin; they therefore affect the whole goods in communion;(*d*) and, so far as they go, diminish the *jus relictæ*(*e*) and *legitim*,(*f*) as well as the dead's part.(*g*) Where the husband, in his marriage-contract, provides the widow in a particular part of the moveables, she becomes the husband's creditor, and, in that character, is preferable *pari passu* with his other personal creditors on the moveable estate, if it be not sufficient for the payment of all the debts.(*h*) If it be more than sufficient for that purpose, she is

(*z*) See note (*y*). From the passing of the Intestacy Act, 1855, to the passing of the Married Women's Property Act, 1881 (App.), the wife's children or other representatives could claim no part of any moveable estate acquired or succeeded to by her, with the trifling exceptions made by the Conjugal Rights Acts. See § 90.

(*a*) Heirship moveables abolished, § 237.

(*b*) See note (*z*). Also table, § 130, under the heading of this section.

(*c*) In the Intestacy Act, 1855, "moveable estate" is defined as the *free* moveable estate on which the deceased might have tested—*i.e.*, the dead's part.

(*d*) This term not now applicable, § 89.

(*e*) See §§ 91-98.

(*f*) See §§ 100-113.

(*g*) See § 114.

(*h*) This seems too broadly stated. To give the wife a preference, the provision in her favour will require to be in some way secured, and no preference can be created over corporeal moveables, of which the possession is retained by the husband M'Laren, 1, 418.

[1] 3, 9, 22.

entitled both to her special provision and her *jus relictæ*, if she has not accepted the first in full satisfaction of the last conformably to the rule already laid down. Donations to the wife, and obligations of provision to children, delivered to them by the granter *in liege poustie*, whether by marriage-contract or in separate bonds, must, like other debts due by the deceased, come off the whole head of the executry. The funeral charges of the deceased, the widow's mournings, and the alimony due to her from the day of her husband's death till the first moiety of her jointure be payable, affect also the whole executry; for though those debts are never contracted till after his death, yet, because by the necessity of nature, that expense must be incurred by all men, it is therefore in the judgment of law the husband's proper debt; but legacies or gratuitous obligations granted by him on death-bed, because they cannot hurt the *legitim* or *jus relictæ*, affect only his dead's part. The share of the goods in communion(*i*) which, on the wife's predecease, falls to her next-of-kin,(*k*) cannot be affected by any debt contracted by the husband after her death; because the right of that share accrues *ipso jure* to the wife's executors by the division consequent upon her death, after which the husband hath no power over it. But the wife's funeral charges are considered as her own proper debt, and so fall wholly on her executors or next-of-kin, who are entitled to her share, and they will affect her paraphernalia(*l*) as well as other executry. Personal bonds due to the husband, because they are by 1661, c. 32, moveable in respect of succession,(*m*) and heritable as to the widow, must therefore increase the *legitim* and dead's part, but not the *jus relictæ*; and as she has no benefit from such bonds when due to the husband, neither can her share decrease by any personal bonds due by him, the burden of which falls altogether upon his children or next-of-kin.(*n*) These observations concerning the *legitim*, and *jus relictæ*, in questions with the widow, children, and next-of-kin, are not applicable to the case of a competition

(*i*) See note (*d*).

(*k*) See note (*z*).

(*l*) This right appears to have been abolished, or at least rendered nugatory, by the act which vests in the wife, as separate estate, her whole personal estate, § 119.

(*m*) When they do not exclude executors, § 83.

(*n*) Heritable bonds are now also moveable estate, except where executors are excluded in them. But however expressed, all such bonds are heritable as regards terce, *jus relictæ*, and *legitim*, § 83. The same rule would probably now be held to apply to courtesy in the case of such bonds belonging to the wife, § 99.

with the creditors of the deceased. Let the estate falling under communion be ever so large, if there be heritable debts due by the deceased more than will exhaust it, the creditors in these can affect the whole executry for their payment."

62. **Legitim is not due to Children forisfamiliated. Effect of a Child's renouncing the Legitim.**[1]—"By a child forisfamiliated is to be understood one who, by having already received from his father his share of the legitim and discharged it, or by his renouncing it even without real satisfaction, is no longer accounted a child in the family, and is therefore excluded from any further share of it. As this right of legitim is strongly founded in nature, the renunciation of it is not to be inferred by implication.(*o*) It is not presumed, either from the child's marriage, or his carrying on a trade by himself, or even his acceptance of a special provision from the father at his marriage, if he have not expressly accepted of the provision in full satisfaction of the legitim. But as one, while he has neither wife nor child, has absolute power over his whole estate, he may, by marriage contract, settle provisions on his younger children to be procreated of the marriage in satisfaction of the legitim, which, though never accepted of by them, will effectually exclude their right to it. On this ground, a daughter was found excluded from the legitim, where the father had, in his marriage-contract, provided the whole conquest to the children of the marriage, notwithstanding her plea that he had, in the distribution of it among his children, given her the smallest share. A child's renunciation of the legitim,(*p*) or his acceptance of a sum in satisfaction of it, hath the same effect in regard of the younger children entitled to it as the death of the renouncer; so that his share divides equally among the rest. But a child renouncing the legitim is not cut off from his right to the father's dead's part; for to that he is entitled, not as a child *in familia*, but as next-of-kin to the father. Where, therefore, there is but one younger child, his renunciation of the legitim has the effect of turning the whole of that right to which he was entitled as the only younger child, into dead's part; and consequently all the executry

(*o*) See §§ 107, 108.

(*p*) There are distinctions. See the effect of a discharge of *legitim* *during* father's life as compared with a discharge *after* his death, §§ 109, 110.

[1] 3, 9, 23.

falls to the renouncer himself in the character of the father's next-of-kin, unless the heir be willing to collate the heritage with him. But where a child renounces not only his legitim, but, in general, all interest of whatever sort in the executry, or all that he might claim by his father's death, such renunciation plainly imports a renunciation also of the dead's part. The renunciation both of the legitim and dead's part by a younger child operates in favour not only of the younger children who continue in family with their father, but in favour of their descendants; so that the child renouncing cannot claim the office of executry in competition with any of those descendants, though he be truly a degree nearer in blood to the deceased than they. In like manner such renunciation excludes not only the renouncer himself, but his descendants, in competition with the descendants of the children who had not renounced; for they cannot, in their father's right, lay claim to any subject to which the father has expressly given up his claim; but the renouncer's children are not excluded in a question with collaterals, after all the other descendants of the deceased have failed; for where the father procures a renunciation of the legitim or executry from any child, his purpose is barely that his other children may have the benefit of it, without the least intention that any of his own descendants, even the children of the renouncer himself, should be thereby excluded from their natural right, in competition with a collateral kinsman."(*q*)

63. Collation among the Younger Children.[1]—"For preserving an equality in the distribution of the legitim among the younger sons entitled to it, who have an equal interest in the father's moveable estate, we have adopted the doctrine of the Roman Law, which introduced a *collatio*,(*r*) by which the child who had already got a provision from the father was obliged to collate it with the other children, and impute it in his part of the legitim.(*s*) Every provision given by the father(*t*) to the child falls under collation: not only the tocher or other provisions granted in his or her marriage contract or in separate bonds; but all sums actually advanced by the father

(*q*) In this case the children take as next-of-kin, and, consequently, exclude collaterals who are in the second line of succession, § 129.

For rules in Stair see § 19; Mackenzie, § 34.

(*r*) *Collatio bonorum inter liberos.*

(*s*) See §§ 111, 112.

(*t*) This doctrine will now apparently apply to the wife's separate personal estate, §§ 99, 113.

[1] 3, 9, 24.

to the child or for his behoof, though without any writing signed by the receiver obliging himself to account; which sums may be proved by his oath. But neither the expense of such education as is suitable to the child's quality or fortune, nor inconsiderable presents made to him by the father, suffer collation."(*u*)

64. In what Cases it is Excluded.[1]—"Collation is excluded where it appears evidently to have been the granter's intention that the child should have the provision as a *præcipuum* over and above his share of the legitim. Thus, first, a clause in a bond of provision by a father that the child should, notwithstanding that provision, have at his death an equal share of his goods with his other children, is the clearest indication of his will that the provision should not be collated. Stair affirms that a clause declaring that the child shall continue a bairn in the house, implies also a prohibition to collate, and it was so adjudged. But a father's declaration in the bond of provision that the child is to continue in his family, and, consequently, to be entitled to a share of the legitim, seems to be but a slight evidence of his purpose that the child is not to collate, for collation is admitted only among those who are entitled to a legitim. Secondly, a child cannot be compelled to collate a bond of provision granted to him by his father on death-bed, contrary to the doctrine maintained by some writers; for if he were, the provision would be altogether frustraneous, since the child could not receive the least degree of benefit by it, though it be obvious that the father meant it as a gratification to him. It is true that the father cannot, by a death-bed deed,(*v*) diminish the legitim to the prejudice of any of his children, but he may dispose of his dead's part, *etiam in articulo mortis*;(*w*) and if he can bequeath it to a stranger, much more to his own child. Upon a ground extremely similar, a legacy by a husband to his wife was presumed to have been granted wholly out of the dead's part, and so not imputable towards satisfying her *jus relictæ*.(*x*) Where a land estate or an heritable right is provided to a younger

(*u*) This corresponds generally with the English law on the subject, § 218.

(*v*) *I.e.*, a testamentary deed, or deed to take effect after his death. Law of death-bed abolished by 34 & 35 Vict. c. 81.

(*w*) Although the wife's personal estate is now vested in herself, it would seem that she cannot dispose of it without the consent of the husband or of the court, 44 & 45 Vict. c. 21 (App.).

(*x*) See §§ 95, 96, as to discharge or satisfaction of *jus relictæ*.

[1] 3, 9, 25.

child he is not bound to collate it, for the subject of the legitim is not impaired by such provision, since the fund out of which the legitim is due does not arise from heritable rights. As this kind of collation is introduced, that equal justice may be done to all who have a right in the legitim, it does not affect the right of third parties. Hence a widow cannot be compelled to collate legacies or donations given to her by her husband, and thereby to increase the *legitim*, nor, on the other hand, are children *in familia* obliged to collate their provisions with the widow in order to increase the *jus relictæ*."

65. The King Succeeds as *ultimus hæres* to Bastards.[1]—This is the proper place for treating of the crown's right arising from the death of a bastard. It has been already explained who they are whom the law accounts bastards;(*y*) the effects of bastardy may be now considered. It is a settled rule in the law of Scotland that there is no succession by the mother,(*z*) and that all estates, whether heritable or moveable,(*a*) can, after the death of the owner, descend only to such as are related to him by the father. A bastard, his father being uncertain, can have no relations by the father, and, of course, no collateral heirs upon his death.(*b*) If he die without lawful issue, therefore, the king takes up his succession by the necessity of law, in the character of last heir.(*c*) Hence it appears that bastardy is a proper species of *ultimus hæres*, the crown succeeding because the bastard has no agnates to claim his succession. The crown's right, too, is precisely the same in bastardy as in the other. It comprehends the *universitas bonorum* of the deceased. It cannot be hurt by a deed on death-bed.(*d*) The same methods

(*y*) See § 126.

(*z*) See exceptions stated in §§ 87, 88.

(*a*) Under the Married Women's Property Act, 1881, the wife's moveable estate is vested in herself, and her husband and children have on her death indefeasible rights in it. She cannot dispose of it without the consent of her husband or the court. As regards moveable estate, there is a succession from the wife; and although the father of a bastard may be "uncertain," the mother is not so; the bastard is truly her child, and as such, would appear, under the new law, to be entitled to succeed to his mother's estate, and *vice versa*.

(*b*) This is so as regards the father's estate, but the rule may not now apply as regards the mother's separate estate.

(*c*) The mother would appear to be entitled to one-third of his moveable estate, on the principle of the Intestacy Act, 1855.

(*d*) Law of death-bed abolished by 34 & 35 Vict. c. 81 (1871).

[1] 3, 10, 5.

must be pursued by the king to make good his interest in the succession. On the other hand, the estate which accrues to the crown is in both cases subjected to the same diligence of creditors and to the same burdens; the widow, *e.g.*, is entitled to her legal provisions of terce, and *jus relictæ* in either case; for the donatary's is no better than a right of succession, since he is assignee by the king, whom the law looks upon as successor, and the legal provisions of widows cannot be hurt by any right of succession whether legal or testamentary. There is only one difference between the two. Creditors may confirm the moveable effects of one to whom the king hath succeeded as last heir. They cannot confirm a bastard's testament; because, as will be immediately explained, a bastard is incapable of making a testament.(*e*) In this case they must bring an action against the king's donatary, not indeed simply, but in so far as he hath received of the bastard's effects."

66. If the Bastard has Lawful Children, the Crown is Excluded. Whether Bastards can make a Testament.[1]— "This right in the crown to the escheat of bastardy is excluded where the bastard has lawful children of his own body; for these children are the bastard's proper heirs, since they have a certain father, *quem nuptiæ demonstrant*, and to whom they may serve heirs in terms of the brief of inquest. Upon the death of the bastard's immediate issue, the children of that issue succeed by the same rule; but if these last shall die without lawful children, the king takes the succession as their *ultimus hæres*, upon the supposition that their immediate father has died before them, since they have no relation by the father, and the mother's line of succession is not regarded in the matter of succession.(*f*) Though the bastard should have no lawful issue, it is agreed by all that during his life, and while he is in *liege poustie*, he is absolute proprietor of his whole estate, and, as such, may sell or gift it by any deed *inter vivos*. He may even settle his heritable estate by a destination which is not to take effect till his death, in favour of any person he may think proper. The rule, therefore, that a bastard can have no heirs except those of his own body, must be limited to legal heirs, and is not to be extended to heirs of provision. Most of the commentators on the Roman Law affirm that bastards have the full power of making a

(*e*) A bastard can make a testament, 6 Will. IV. c. 22.

(*f*) See note (*a*), § 65.

[1] 3, 10, 6.

testament: because there is neither any reason in the nature of things, nor any text in that law which disables them; and because they have committed no crime which ought to forfeit them of that natural right, as the Roman lawyer equitably argues in their behalf in a similar case. Craig seems to be of the opinion that this is also the law of Scotland, where he asserts that if a bastard die intestate and without lawful issue, the king succeeds to his moveable estate: which clearly supposes that the bastard had a right to test. It must, however, be acknowledged that we have, by our later customs adopted the doctrine of some other states, that bastards who have no lawful issue are incapable of making a testament.(*g*) This is said by some to proceed *ex defectu natalium;* though it is hard to discover a reason why a disability to test should be one of the consequences of illegitimacy. Where the bastard has lawful issue, he has without doubt the full *facto testamenti,* as the Roman law expresses it, and may consequently make a testament, not only in favour of that issue, but of strangers. In such case the king has no interest to object, since he is excluded from all right, even to the moveable succession by the bastard's children, who are both heirs and executors to the deceased, whether he died testate or intestate. As a consequence of this, the bastard must also have a power of naming tutors to his lawful issue. It has been observed that the issue of an intermarriage between an adulterer and the adulteress, after the dissolution of the former marriage by divorce, are not, in the opinion of Stair, bastards, notwithstanding the Act 1600, c. 20. If this opinion be well founded, the Crown's right here explained cannot take place to their prejudice; for, as they are not bastards, they have the power of testing; and upon their death their legal heirs, though not of their own body, will take the succession."

67. Legitimation of Bastards.[1]—"Bastards are sometimes legitimated by the sovereign. Legitimation, in the proper sense of the word, and in that of the Roman law, entitled the person legitimated to all the rights of lawfully begotten children. . . . The bastard is not entitled, in consequence of this sort of legitimation, to a bairn's part of gear, nor to any share of the father's succession.(*h*) Yet, where the right of third parties is not affected, the king may

(*g*) See note (*e*).

(*h*) But the bastard appears now to be entitled to succeed to his mother's separate moveable estate, § 126.

[1] 3, 10, 7.

effectually renounce any right competent to himself in favour of the bastard or any other, since he himself is the only sufferer by such renunciation. Though, therefore, he is by law entitled to the bastard's succession, he may, by letters of legitimation, enable that person to succeed *ab intestato* to the bastard who would have been his heir, had the bastard been procreated in lawful marriage."

Bell's Principles.

We shall only notice further that eminently practical work, the "Principles of the Law of Scotland," by Professor George Joseph Bell, which was published in 1829. Bell was born in 1770, called to the Bar in 1791, appointed Professor of Scots Law in 1822, and one of the clerks of the Court of Session in 1833. He died in 1843. He was one of the greatest commercial lawyers of his time, and has left behind him, in addition to his "Principles," commentaries of the law and other works, which have become, and are likely to remain, standard works in our law.

We extract the following lucid statement of the law from the Principles, Edition 1829 :—

68. Law of Descent and Consanguinity as applicable to Succession generally.[1]—"The law of succession naturally contemplates the domestic society as possessed of a common stock, divisible either equally or in certain proportions among the children.(*i*) The ancient Roman Law of Succession was not very different from this; and the Justinian Law of Succession was settled upon similar views. The modern law of succession, influenced by the feudal system, is, in regard to land, arranged on the principle of primogeniture, while moveables are disposed of nearly on the principles of the Roman jurisprudence.(*k*)

In both courses of succession there is perpetual reference to the lines of consanguinity, of which there are three:—1. Descent; 2. Collateral; 3. Ascent. The first and the last are called lineal, in contradistinction to the second; and have *vinculum personarum ab eodem stipite descendentium*, as all descending in a direct line from one common ancestor.

(*i*) This was formerly so in moveable estate, but not in heritage; and in moveables the idea of a common stock has been affected by the Married Women's Property Act, 1881, see § 89.

(*k*) In equal shares to the next-of-kin or legal representatives, §§ 84, 125, 129.

[1] §§ 495-502.

1. *Lineal Descent* includes issue immediate and remote, each generation forming a degree of descent.

2. *Lineal Ascent* comprehends immediate parents and ancestry in the direct line, as high as evidence can reach.

3. *Collateral Kindred* also descend from one common ancestor with the deceased, but not, as in lineal succession, from each other. And here it is necessary to distinguish—(1.) the full from the half-blood; (2.) in half-blood, the consanguinean from the uterine.

Full blood, or germain, is of persons born or descended of the same father and mother.

Half-blood is either—(1.) Consanguinean; of persons born or descended of the same father, but not of the same mother; or, (2.) Uterine; of persons born or descended of the same mother, but not of the same father. Law recognises no relationship between the consanguinean and the uterine; and there is no succession *ab intestato* of the one to the other (*l*).

Relationship of full or of half-blood is not [as in the books of the Feus] stopt at the seventh degree; but is reckoned in Scotland to extend as far as the evidence of propinquity will reach.

69. Law of Succession in Land *ab Intestato*.[1]—In succession to land, the Law of Scotland avoids partition (except where females succeed), and prefers males. But there is a difference in respect to the male to be preferred, between lands descending from an ancestor, and lands acquired by the deceased.(*m*) Hence the former is distinguished as **Heritage**, the latter under the name of **Conquest.**

70. Law of Succession in Heritage.[2]—This doctrine will appear the more clearly by taking, first, the descent of the father's estate; afterwards the mother's.

I. Father's estate. This descends in succession in the three several lines already stated.

1. *Rules of Lineal Descent.*—Referring to the explanation of consanguinity already given, the rules are:—

(*l*) This rule has been modified by the Act of 1855; uterine collaterals take one half of the moveable estate where the deceased left neither issue, parents, nor collaterals german or consanguinean, § 87.

(*m*) This distinction between heritage and conquest was abolished by 37 & 38 Vict. c. 94, § 37, as to all successions opening after 1st October, 1874.

[1] § 504.

[2] §§ 505-523.

First Canon. That the right of succession to land *ab intestato* is in the lawful issue of the person who died last vest and seized in the land.

Second Canon. That of the issue of the person last vest(*n*) in the land, the males (and their lawful issue *in infinitum*) first succeed *ab intestato* to the land.

Third Canon. That of the male issue, the eldest is preferred with his issue; and the rest with their issue in the order of seniority.

Fourth Canon. That, failing the male issue and their issue, the female issue and their issue inherit *pro indiviso* as heirs-portioners. And (1.) The daughters, of whatever marriage,(*o*) succeed equally to subjects divisible. (2.) The issue of each daughter takes her place(*p*). (3.) Subjects indivisible go to the eldest daughter. (4.) The eldest has also such peerages, dignities, and titles of honour as are not limited to males. (5.) The eldest has superiorities.(*q*)

Fifth Canon. That where, before the opening of the succession, a descendant has died, who, if alive, would have succeeded as heir to the deceased, his place is supplied, and the succession filled by his lineal descendant. This is called representation.

2. *Rules of Collateral Succession.*—On the exhaustion of the line of descent (children, grandchildren, and their descendants), the succession, instead of ascending to the grandfather, deviates to the collateral line, accompanied by primogeniture, representation, and partition among females. The rules are these :—

First Canon. That the germain or full blood succeeds in the first place.

Second Canon. That the half-blood consanguinean succeeds after the full blood; brothers first, and next sisters; but the half-blood uterine is excluded.

Third Canon. That heritage first descends as far as possible; then ascends gradually. So, on the death of a middle brother, his younger brothers (and their issue), in their order from elder to younger, succeed before the elder. And elder brothers

(*n*) Heritable property is now held to vest in heirs without service, 37 & 38 Vict. c. 94, § 9.

(*o*) This means the father's daughters.

(*p*) First sons in their order, then daughters equally.

(*q*) But not without payment, and where more than one, they must be divided. *Rae*, Jan. 1810, F.C. See §§ 26, 48, for Stair and Erskine's dicta.

succeeding to younger are (with their issue respectively) preferred in an inverse order from younger to elder.

Fourth Canon. That, where a woman dies leaving heritage, her brothers(*r*) succeed before her sisters, and according to the order now stated.(*s*)

3. *Three Rules of the Ascending Line.*—After collaterals (or if there be none) the heritage goes to the father.

First Canon. That heritage ascends to the father and his relations, to the exclusion of the maternal line.

Second Canon. That the succession never ascends to the mother or her relations.

II. Mother's Estate. The rules and canons of descent are the same as in the father's estate, with primogeniture, representation, and partition among females. But,

The mother's estate, after vesting in her son or daughter, never ascends to the mother again, or through her.

The right of the Crown as *ultimus hæres* vests on failure of the three lines of succession now stated. This is a caduciary right; not a right of succession.

71. Law of Succession in Conquest.[1](*t*)—In this the Law of Scotland accords neither with the law of the Feus, nor with the Law of England, but is peculiar to ourselves. 1. The conquest of a middle brother goes to his immediate elder brother alive, or to the next younger alive, failing issue of intermediate brothers who have died. 2. The conquest of a sister goes also to her next elder brother, or next younger alive (failing issue of nearer who are dead), preferably to her sisters. 3. Where there are only sisters, there is equal partition in conquest, as in heritage. 4. In conquest, as in heritage, the whole blood excludes the half; but if there be no brothers or sisters-german, or issue of them, the rule holds as to brothers-consanguinean; and 5. There is representation as in heritage.

The difference between conquest and heritage is this: that conquest is a fee coming into the person of the deceased by purchase, gift, &c., from a stranger, or from one to whom he would not by

(*r*) And their issue.

(*s*) The sisters, when the succession opens to them, are heirs-portioners, § 247.

(*t*) The distinction between heritage and conquest abolished by 37 & 38 Vict. c. 94, § 37.

[1] §§ 524-530.

law have succeeded; while heritage is a fee in which one succeeds as heir to his father, grandfather, or other ancestor.

Conquest comprehends,—1. Heritable subjects vested by sasine, or requiring sasine to complete the transference. 2. The converse holds, that heritable subjects which do not require sasine are not conquest, but go to the heir in heritage; as leases and bonds excluding executors. 3. Teinds are not conquest, as they affect the fruit, not the land.(*u*)

Subjects which were truly heritage in the person of the deceased do not become conquest by the interposition of a conveyance in his favour.

Things which come by force of destination, and are taken up by service as heir of provision, are not conquest but heritage; as an estate coming to a middle brother by deed of entail.

Conquest, in descending from the heir of conquest, becomes heritage. But it seems necessary to this effect, that it should vest in the heir of conquest, otherwise, remaining *in hæreditate jacente* of the acquirer, it will go to his heir of conquest.

Succession to an heir of conquest, as contradistinguished from succession to the heir of line, is only where a middle brother or sister (or their issue) dies, leaving younger and elder brothers or uncles. The younger brother (or uncle) takes the heritage; the elder the conquest.

72. Of the Law of Succession in Moveables.[1]—"Moveable succession differs from heritable in these points:—1. That there is no preference of males. 2. That there is no law of primogeniture. 3. That there is no representation of the deceased parent by the child.(*v*) 4. That there is no distinction of conquest.

"The whole moveable estate, if the deceased die unmarried; or the dead's part, if married, descends thus:—

1. The free moveable estate divides among the nearest-in-kin at the death.(*w*)

(*u*) This seems incorrect. See M'Laren on Wills, i. 77. See § 236.

(*v*) By the Act 18 Vict. c. 23 (1855) representation is introduced into moveable succession among descendants and their issue, and brothers and sisters and their issue.

(*w*) In the enlarged sense of the Act of 1855. Under that Act also the father, and failing him, the mother of the deceased, takes a share if he left no descendants. Uterine collateral relatives have now a contingent right to one-half of the estate, § 87.

[1] § 671.

2. The full blood excludes the half.

3. The lines of succession follow the same order as in heritable successions, — descendants, collaterals, ascendants with their collaterals.

4. If one of the next-of-kin be also entitled as heir to an heritable estate which he does not choose to communicate to the other next-of-kin, he will have no share of the moveables.(*x*)

5. The succession in moveables is regulated by the law of the domicile at the time of death.(*y*)

73. Doctrines bearing Relation both to Heritable and Moveable Succession.[1]

I. *Heirship Moveables.*—"The heir of a baron or burgess, though excluded from the moveable succession, has right to the best of certain moveables, that he may not enter to his predecessor's dwelling-house quite dismantled by the executors.(*z*)

1. A baron, in this question, is any feudal proprietor, vest and seised in lands, houses, or annual rents forth of lands; but one who holds a mere liferent, or conjunct fee, or personal right to lands, is not a baron.

2. A burgess must be either infeft in a burgage tenement, or a trading burgess, in order to entitle his heir to heirship moveables.

Heirship moveables may be claimed although the land is settled on another than the heir. Heirs-portioners (contrary to Erskine's opinion) divide the heirship. If the heir renounce heirship moveables, they go to the executor.

Subjects of heirship are moveables appropriated to the person, and insight and outsight plenishing. It is held—(1.) That heirship is not limited to the moveables left upon the lands in which the deceased was infeft. (2.) That the heir is entitled, not to the furniture of the best house, but to the best articles of furniture in every house belonging to the deceased. (3.) That farm stocking, raised or fed for sale, is not heirship.

The heir's right to heirship moveables is protected by the law of death-bed.(*a*)

(*x*) The heir of a predeceasing heir may now collate with the next-of-kin, and if he does not do so, the other issue of the predeceaser are not now precluded from claiming the difference between the value of the heritage and the share their parent would have taken in collation. Act of 1855.

(*y*) See § 82.

(*z*) The right to heirship moveables was abolished in 1868 by 31 & 32 Vict. c. 101, § 160.

(*a*) Law of death-bed was abolished by 34 & 35 Vict. c. 81. It takes effect from 16th August, 1871.

[1] §§ 7117-20.

II. *Collation.*(*b*)—"Although heritage goes to the heir, and moveables to the next-of-kin, the heir (provided he is also one of the next-of-kin) may throw the heritage into the common stock, and insist for an equal share with the other next-of-kin. This is called **Collation.** The heir is, in some cases, entitled to claim a share without giving up the land. These cases will be considered in their order.

"1. *Right to Collate.*—This right belongs to the heir *ab intestato*, where there is both an heritable and a moveable estate. And (1.) if the heir be sole executor, he is not bound to collate with the widow. (2.) A collateral heir is entitled to collate. (3.) The heir of conquest is entitled to collate. (4.) If the heir be not one of the next-of-kin, he is not entitled to collate.(*c*) (5.) There is no collation in heritage amongst heirs-portioners.(*d*) (6.) The privilege of collation may be excluded by the will of the deceased.

"2. *Right of the Heir to Moveables without Collation.*—(1.) Where one, who is also next-of-kin, takes as heir of provision, not being heir *alioquin successurus*, he is entitled to his share of moveables without collation. (2.) He is so entitled, if he takes the heritage, not directly from the deceased, but from one more remote. (3.) If he be heir *alioquin successurus*, he cannot claim without collating, although he should take the land by deed. (4.) Although the heritable estate be in another country, the heir must collate in claiming a share of moveables in Scotland; but not if he claims the moveables under the English statute of distributions.(*e*)

"3. *Mode of giving Effect to Collation.*—(1.) Where the heir is one of the next-of-kin, but not bound to collate, he is entitled to confirm as an executor. (2.) Where the heir must collate, he is entitled (on making up his titles to the heritage and disponing) to assume the character of executor. (3.) The transaction is commonly settled by private contract, the heir and executors completing their respective titles, and dividing the funds. (4.) If judicial proceedings be necessary, the heir raises his action against

(*b*) Collation is affected by the Act 1855. A grandson may collate, though not one of next-of-kin; and should he decline, his brothers or sisters are entitled to claim a share of the common stock. See §§ 36, 241.

(*c*) This rule now altered as in note (*b*).

(*d*) Not when these are sole next-of-kin, but among nieces and nephews the rule is now otherwise.

(*e*) Or under the law of a country which has not adopted the doctrine of collation.

the executors, concluding for declarator of his right, an order on the executors to account, and (on his completing his title and disponing) to deliver or pay over his share."

The Changes Effected by Legislation during the Last Century.

74. General View.—There remains only to notice under this head the changes which have been effected by statute on the law of succession since the publication of the above works.(*f*)

The first in order is the Act 18 Vict. c. 23 entitled "An Act to alter in certain respects the Law of Intestate *Moveable* Succession in Scotland," and which came into operation on 25th May, 1855. The changes introduced by this Act may be summarised as follows :—

It admits the doctrine of representation amongst descendants and the brothers and sisters of an intestate and their descendants. For example, if an intestate leave two children and two grandchildren—issue of a predeceasing son or daughter, the grandchildren will take the share of the succession which their parent would have taken if in life. The rule extends to the descendants of brothers and sisters of the intestate, but not further.

Heirs-at-law taking by representation are entitled to collate or mass the heritable with the moveable estate to the effect of claiming a share of the common fund. And the other issue of the predeceaser are not precluded by the heir refusing to collate from claiming the difference between the value of the heritage and the share their parent would have taken on collation.

Where an intestate without issue is survived by his father and by collateral relations, the father is entitled to one-half of the succession preferably to such relatives.

Failing the father, the mother is similarly entitled to one-third of the succession.

Failing brothers and sisters german or consanguinean and their descendants, collateral uterine relatives take one-half of the succession.

(*f*) The whole of the Statutes in question will be found in an appendix, with explanatory and illustrative notes.

In each of the last three cases the division is of the free moveable estate on which the intestate might have tested.

The former rights of relatives of a wife predeceasing her husband to a share of the goods in communion are taken away, as well as the wife's right to bequeath part of such goods.

The rule as to marriages dissolved within a year and day is abolished.

Executors nominate are deprived of all right to any part of the succession in their character as such.

By the Conjugal Rights Act, which was passed on 6th August, 1861, and came into operation 1st November following, a wife deserted by her husband is enabled to take steps to secure for her own behoof, exclusive of his legal rights, property acquired by her own industry, or by succession.

Terce is also made claimable from burgage property.

The Act 33 Vict. c. 14, passed on 12th May, 1870, removes certain disabilities formerly attaching to aliens in the matter of holding and dealing with heritable property in Scotland.

The Act 33 & 34 Vict. c. 35, passed on 1st August, 1870, makes rents and other periodical payments accruing from day to day apportionable in respect of time.

The right to heirship moveables is abolished by section 160 of 31 & 32 Vict. c. 101 as regards all successions opening after 31st Dec. 1868.

The distinction between heritage and conquest is abolished by section 37 of 37 & 38 Vict. c. 94 as regards successions opening after 1st October, 1874.

The Act 40 & 41 Vict. c. 29, passed on 2nd August, 1877, excludes the *jus mariti* and right of administration of husbands from wages and earnings of their wives in businesses, &c., carried on under their own name, and it limits the former's liability for the latter's antenuptial debts to the amount of the estate received through the latter.

Under 43 & 44 Vict. c. 26, passed on 26th August, 1880, a married woman is enabled to effect a policy of assurance on the life either of herself or her husband for her separate use, and a husband may effect a policy of assurance on his own life, in trust for the benefit of his wife or children, or both, and if the assurance has been in force for two years it is unchallengeable by creditors of the husband.

But the greatest changes on the law of succession since the passing of the Intestacy Act of 1855 are made by the Act 44 & 45 Vict. c. 21, which came into operation on 18th July, 1881. These changes may be briefly stated as follows :—

(1.) *As regards marriages contracted after the passing of the Act*—

The wife's personal estate is vested in herself, and is not subject to the *jus mariti* of the husband, provided the husband had at the time of the marriage his domicile in Scotland.

The income from such estate is payable on the wife's own receipt, but she cannot assign the prospective income or dispose of such estate without her husband's consent.

Her estate, if clearly distinguishable, cannot be attached for the husband's debts.

The Act does not abridge or exclude the power of settlement by antenuptial contract.

(2.) *As regards marriages contracted before the passing of the Act*—

The rents of the wife's heritable property are separate estate in her person.

The Act does not apply where the husband had, previous to its date, by irrevocable deed, made a reasonable provision for his wife ; nor in other cases, except that the *jus mariti* and right of administration are excluded from all estate and income acquired by the wife after its date.

Persons married before date of Act may come under its provisions by deed.

The husband of a woman dying after the passing of the Act takes the same share in her moveable estate which was previously taken by a widow in her deceased husband's moveable estate, and subject to the same rules of law as to amount, exclusion, discharge, or satisfaction thereof.

The children of a woman so dying take legitim in the same way, and subject to the same conditions.

The Act does not affect contracts made, or to be made, between persons before or during marriage, or the law as to donations between man and wife, or the wife's non-liability to diligence, or her rights under the Act 40 & 41 Vict. c. 29, above referred to.

INTESTATE SUCCESSION IN MOVEABLE ESTATE.

Definitions and General Rules.

75. Meaning of Succession.—Succession is the right which transmits to the living the property of a person deceased. It is of two kinds: heritable as distinguished from moveable; and is transmissible in two forms—testate as distinguished from intestate succession.

76. Heritable and Moveable.—Every species of property, and every right a man can hold, falls to be classified under either of these two heads. As a general rule, the former comprehends land, houses, and all those things which are parts of either; and the latter, all those things which are capable of being transported from one place to another. The distinctions, which are in some instances purely artificial, are more particularly referred to hereafter.(*a*) Here, it is sufficient to observe that the distinction between heritable and moveable property is of the essence of legal succession; the rules which regulate succession to the one being entirely different from the rules which regulate succession to the other kind of property. Besides that, as a general rule, heritable property goes to the heir-at-law, whilst moveable property goes to the next-of-kin.

77. Testate and Intestate Succession.—Succession is called *testate* where the deceased made a valid testamentary disposition of his property: *intestate* where the privilege to make such a deed was neglected by the deceased,—in which case the law supplies his omission, and distributes his property according to fixed rules. It is with this latter form of succession only that we here chiefly concern ourselves. Intestacy has been aptly described by a high authority thus:—"A person dies intestate who either executed no will, or whose will is void, or whose will, though valid at its execution, was avoided subsequently, or is of no effect for want of an heir."(*b*)

78. Who may Execute a Valid Testamentary Deed.—Generally, every person of sound mind, and not subject to any

(*a*) §§ 83, 235.

(*b*) Justinian, Inst. 3, 1.

legal incapacity, may make a valid disposition of his property. Legal incapacity attaches to—

(1.) Pupils—*i.e.*, females under twelve, and males under fourteen years of age. All such are legally incapable of granting any deed.(*c*)

(2.) Minors—*i.e.*, persons above pupillarity, but under twenty-one years of age. These can bequeath moveable property without the consent of their curators,(*d*) but they cannot convey heritable property *mortis causa* even with such consent.(*e*)

(3.) Married women. Under the older law, and, indeed, until the passing of the Moveable Succession Act, 1855, a married woman was held entitled to make a disposition *mortis causa* of her share of the goods in communion as well as of her heritable estate,(*f*) but by that Act she was rendered incapable of making a valid will of moveable estate,(*g*) except of such property as she might hold exclusive of her husband's legal rights, or over which a disposing power was given to her by the deed through which the property had been derived.(*h*)

The law stood thus down to the year 1861, when the Legislature began to pass a series of Acts increasing the rights and powers of administration of married women in relation to moveable property.

By the first two of these Acts, viz.:—The Conjugal Rights Amendment Act,(*i*) which came into operation on 1st November, 1861; and the Conjugal Rights Amendment Act,(*k*) which came into operation on 7th July, 1874; it is provided (1) that a wife deserted by her husband may apply to the Court for an order to protect moveable property which she has acquired or may acquire by her own industry, or by succession, and that on such order being obtained, such property not having previously been taken possession of by the husband or attached by his creditors, shall belong to her as if unmarried, and the order shall have the effect of a decree of separation *a mensa et thoro* in regard to the property, rights, and obligations of the husband and of the wife; (2) that where a decree of separation *a mensa et thoro* is obtained by the wife, her moveable property shall belong to her exclusive of the *jus*

(*c*) Ersk. 1, 7, 1.
(*d*) Ersk. 1, 7, 33; Fraser, 381.
(*e*) Cunynghame, 1797 M. 8966.
(*f*) Ersk. 1, 6, 28; 1 Fraser, 564.
(*g*) Macdougal, 1858, 20 D. 658.
(*h*) Ersk. 1, 6, 28.
(*i*) 24 & 25 Vict. c. 86.
(*k*) 37 & 38 Vict. c. 31.

mariti and right of administration of the husband, and on her death intestate, shall pass to her heirs and representatives in like manner as if her husband had been then dead; and (3) that where a wife succeeds to moveable property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, she is entitled to claim therefrom a reasonable provision for her support and maintenance, if not previously taken possession of by the husband or attached by his creditors.

The third Act—viz., the Married Women's Property Act,(*l*) which came into operation on 1st January, 1878—provides that the *jus mariti* and right of administration of the husband shall be excluded from wages and earnings of the wife gained by her in any employment, occupation, or trade followed by herself, and also from money or property acquired by her through the exercise of any literary, artistic, or scientific skill, all which, and all investments thereof, shall be deemed to be settled to her sole and separate use.

The fourth Act—viz., The Married Women's Policies of Assurance Act,(*m*) which came into operation on 26th August, 1880—enables a wife to effect a policy of assurance on her own life or on the life of her husband, to be held by her exclusively of the *jus mariti* and right of administration of the husband, and to be assignable by her either *inter vivos* or *mortis causa* without the consent of her husband.

The last of the said series of Acts is the Married Women's Property Act, 1881,(*n*) which mainly affects parties who have married since 18th July, 1881, and estates coming after that date to women married previously. This Act was passed to "further extend" the provisions of the third Act above referred to, and makes extensive alterations on the previous law, or rather it introduces, in the absence of antenuptial contract, rules which, without reference to the provisions touching the *jus mariti* and right of administration in the three Acts above referred to, practically vests in the wife as her separate estate all her own moveable estate, excepting that the husband's right of administration is only excluded as regards the income of such estate and the rents of heritable

(*l*) 40 & 41 Vict. c. 29.
(*m*) 43 & 44 Vict. c. 26.
(*n*) 44 & 45 Vict. c. 21.

property vested in the wife. It provides that where the wife marries *after* the date of the Act, and the husband at the time of the marriage had his domicile in Scotland, her whole moveable or personal estate, whether acquired before or during the marriage, shall by operation of law be vested in her as her separate estate, and shall not be subject to the *jus mariti*; . . . but the wife shall not be entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate.

In the case of marriages contracted *before* the date of the Act, the provisions of it shall not apply where the husband had previously by irrevocable deed made a reasonable provision for his wife in the event of her surviving him, and in other cases the Act shall not apply except that the *jus mariti* shall be excluded from all moveable estate which the wife may acquire after its date, and the right of administration shall be excluded from the income of such moveable estate, and from the rents of heritable property in Scotland belonging to the wife.

In the case of marriages contracted before the passing of the Act the parties may come under its provisions by deed.

(4.) Married men, who can only test on the share of their property called the dead's part.(*o*)

(5.) Idiots—*i.e.*, "such as cannot number twenty, or tell what age they are, or the like," cannot make a valid will.(*p*)

Mad or lunatic persons cannot make a valid will, except, perhaps, during a lucid interval.(*q*)

Mental imbecility, by reason of great age, or occasioned by drunkenness to such an extent as to affect reason or consciousness, may also incapacitate a person from making a will.(*r*)

(6.) Interdicted persons—*i.e.*, those who from weakness, facility, or profusion are liable to be imposed upon, and so have been placed under judicial or private voluntary restraint. But this restraint is confined to heritable property; a will is not defeated by it.(*s*)

(7.) Persons under the undue influence of others, or in a dying state. The validity of deeds by such will depends on the

(*o*) Bell's Prin. § 1592.
(*p*) M'Laren, § 535.
(*q*) *M'Kellar*, 6th Dec. 1861, 24 D. 144.
(*r*) Bell's Prin. §§ 1523, 2103; M'Laren, § 539.
(*s*) Bell's Prin. §§ 2123-28.

degree of mental imbecility and other incapacitating circumstances.(*t*)

79. Intestacy: Total or Partial.—An intestacy is *total* where the deceased leaves the whole of his property undisposed of by will: *partial* where he leaves only a portion of it in that state(*u*). *Intestate* means the deceased person who dies in either of these conditions.(*v*)

80. When a Succession Opens and Vests.—A succession opens at the moment of *natural* death, at which time the character of the heir and next-of-kin becomes irrevocably fixed; except in the case of persons whose estates have been forfeited to the Crown on account of crime, or forfeited under an Entail, or where a nearer heir is *in utero* at the death of the predecessor, and is born alive.(*w*)

Formerly questions of considerable nicety sometimes arose with regard to the estates of persons absent from the country or missing, where it was necessary, in order to ascertain whether a succession had devolved, or, when it devolved, to determine whether those persons were alive, or alive at a particular date; but by an Act which came into operation on 22nd August, 1881,(*x*) various limitations to the presumption of life have been established as regards all persons who have been absent from Scotland, or have disappeared for a number of years.(*y*) Briefly, that Act provides that, on application to the Court—

(1.) The presumption of life may be limited to seven years as regards income from either heritable or moveable estate.

(2.) That the capital of moveable estate may be disposed of on the lapse of seven years from the date of the order as to income.

(3.) That heritable estate may be disposed of on the lapse of thirteen years from date of order as to income from it.

(4.) That the capital of moveable estate may be disposed of after fourteen years' absence, where no previous order made as to income.

(*t*) Bell's Prin. §§ 11, 12, 2105; M'Laren, § 535 *et seq.*

(*u*) *Nelson and Others*, 6th Feb. 1879.

(*v*) 18 Vict. c. 23, § 9.

(*w*) Bell's Prin. §§ 1639, 1642.

(*x*) 44 & 45 Vict. c. 47.

(*y*) The Act does not apply in the case of the disappearance of persons who had never been in Scotland (*Rainham*, 2nd Dec. 1881, 9 R. 207).

(5.) That heritable estate may be disposed of after twenty years' absence, where no previous order made as to income.(z)

(6.) That the claim of absent persons to either heritable or moveable estate, shall be absolutely barred on the lapse of thirteen years from date of order.

(7.) That, "for the purposes of the Act, in all cases where a person has left Scotland, or has disappeared, and where no presumption arises from the fact that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of, at or after such leaving or disappearance."

Policies of assurance are exempted from the operation of the Act.

In every case, it is only the person entitled to succeed to the absent person in the particular estate who can apply to the Court. The applicant must set forth all the facts, and be prepared to prove these facts.

The legal conditions affecting the vesting of successions are, that the persons succeeding shall have been conceived at the opening of the succession and be born alive, be legitimate,(a) and be of uncorrupted blood.(b)

As regards successions from the mother, under the Married Women's Property Act, 1881, it would seem that legitimacy is not a condition affecting her children.

Formerly, aliens—*i.e.*, persons born beyond the dominions of the Crown—could neither take nor hold any property in Scotland: but this restriction has now been removed,(c) without, however, qualifying an alien for any office, or for any municipal, parliamentary, or other franchise; neither can an alien be owner of a British ship.

81. Domicile Governs Law of Distribution (*d*).—Domicile is the residence or permanent home of a person. Moveable property is held in law to follow the person of the owner, and, on his death intestate, it falls to be *distributed* according to the

(z) The proof required to support applications under Heads 4 and 5 is—(1) That the person whose succession is in question had lived up to the period at which he became entitled to the estate; and (2) that he has not since been heard of (*Tawse*, 15th July, 1882; *M'Gregor*, 18th July, 1882, 19 S. L. R. 829).

(a) See § 126.

(b) Bell's Prin. § 1641.

(c) 33 & 34 Vict. c. 14.

(d) Ersk. 3, 9, 4.

law of his permanent home, or where, in legal phrase, he "had his domicile" at the time of his death,(*e*) without any regard whatever to the place either of his birth or of his death, or the situation of his property at the time. Hence, although a person's moveable estate may, in whole or in part, be situated in Scotland, the succession to, and distribution of it fall to be regulated by the law of the country in which the deceased had his domicile,—a rule in conformity with the law and practice of all civilised nations.(*f*)

Where a difficulty arises as to the proper domicile, the court to which properly belongs the right of determining the question is that within whose jurisdiction the principal part of the personal estate is situated.(*g*)

82. How Domicile Acquired.—Domicile is acquired in either of three ways, viz. :—

1. *Domicile of Birth or Origin*, being that which arises from a person's birth and connections(*h*); if born in wedlock, it is determined by the father's domicile at birth(*i*); should the father predecease, it follows that of the surviving mother, if not fraudulently changed(*k*); and, if illegitimate, it is that of the mother's.(*l*) A minor, but not a pupil, has the capacity to acquire a domicile for himself(*m*); but his domicile of birth—*i.e.*, his father's domicile, as a general rule—remains so long as he continues to live with his father or to be supported by him.(*n*)

2. *Domicile of Choice*, being that where a man voluntarily takes up his residence in a country with the intention of making it his permanent home, or at least of remaining there until some event shall induce him to adopt some other permanent home.(*o*)

To acquire a new domicile two things are necessary,—first, actual residence; and, secondly, an intention to make that residence a permanent home(*p*); thus, an emigrant does not lose his old domicile until he arrives at his new one.

With regard to British subjects dying whilst resident abroad, and foreign subjects dying whilst resident in this country, by a

(*e*) Ersk. 3, 9, 4; Bell's Prin. § 1861.

(*f*) Robertson's Succession, 173, 183.

(*g*) Ersk. 1, 2, 16.

(*h*) M'Laren, § 10.

(*i*) *Wyllie*, 11th July, 1834, 12 S. 927.

(*k*) M'Laren, § 13.

(*l*) *Heritors of Lasswade*, 6th March, 1844, 6 D. 956.

(*m*) *Arnott*, 24th Nov. 1846, 9 D. 142.

(*n*) M'Laren, § 12; 1 Fraser, 1252.

(*o*) M'Laren, §§ 19-21.

(*p*) *Bell*, 14th May, 1868, 40 J. 476.

recent Act,(*q*) Her Majesty, by convention with any foreign State, may agree, and by order in Council direct, that, from and after the publication of such order, no British subject resident at death in a foreign country shall be deemed to have acquired a domicile therein, unless resident in such foreign country for one year immediately preceding his or her death, and shall also have made and deposited in a public office of such foreign country a declaration in writing of his intention to become domiciled in that country.

Residence for a year in a furnished house without an intention of making it a permanent home was held insufficient to found a domicile.(*r*) The question, therefore, falls to be solved by the party's acts and declarations.(*s*) *Prima facie*, the place of residence is the domicile, provided there is *animus manendi*.(*t*) A person in the military service of India acquires an Anglo-Indian domicile.(*u*) But residence on foreign service does not affect the domicile of officers in the army or navy(*v*); nor of ambassadors(*w*); nor, it would appear, of consular agents without local connections.(*x*) Governors of Colonies,(*y*) of military stations,(*z*) and other local functionaries of the British dependencies, acquire the domicile of the station to which they are attached; but the appointment of a merchant to a British consulate does not affect his foreign domicile.(*a*) A domicile in one part of the United Kingdom is not altered by military service in another part.(*b*) By attending Parliament in London, a Scotchman does not change his domicile.(*c*) Where the residence is partly at two places—one a place of business, and the other where the wife and family reside—the domicile is at the latter place.(*d*) A domicile of origin is merely superseded by a domicile of choice, and, on the abandonment of the latter, the former revives.(*e*)

3. *Domicile by Operation of Law.*—Thus, by marriage, the domicile of the husband becomes that of the wife,(*f*) and con-

(*q*) 24 & 25 Vict. c. 121.
(*r*) *Bell*, supra.
(*s*) *Wilson*, 8th March, 1872, 10 Macp. 573.
(*t*) *Bruce*, 15th April, 1790.
(*u*) *Wauchope*, 23rd June, 1877, 4 R. 945.
(*v*) *Clark*, 13th February, 1836, 14 S. 488.
(*w*) Story's Conflict, § 48.
(*x*) *Udny*, 14th Dec. 1866, 5 Macp. 164.
(*y*) *In. Rec.* 2nd February, 1850.
(*z*) *Clark*, supra.
(*a*) M'Laren, § 22.
(*b*) Patten, 6 Jur. N. S. 151.
(*c*) *Warrender*, 27th August, 1835 H. L.
(*d*) M'Laren, § 25.
(*e*) *Udny*, supra.
(*f*) *Warrender*, supra.

tinues thereafter, even though they be living apart under a voluntary deed of separation;(*g*) but not, it would seem, if judicially separated.(*h*) A widow may choose her own domicile, and also that of her minor children, if not done with a fraudulent intention.(*i*) As before observed, a British subject does not acquire a foreign domicile until he shall have complied with certain statutory provisions.(*k*)

83. Moveable Property: what it consists of.—As already noticed, everything and every right a person can possess and hold, falls to be classed under the head of either heritable or moveable.

This distinction is of the essence of legal succession, inasmuch as heritable property goes to the heir-at-law, whilst moveable property goes to the next-of-kin of the intestate.

The distinction corresponds substantially with the moveable and immoveable rights of the civil law, and of general jurisprudence.

The two classes of property are divided into things corporeal and things incorporeal; and this classification corresponds with the rules of the civil law as stated by Justinian.

Things corporeal are those which are tangible by their nature, as land, furniture, money, &c.

Things incorporeal are those which are not tangible, as rights and obligations of all kinds.

The character of a thing, as heritable or moveable, may be impressed on it either—

(1.) By its nature, as land; or

(2.) By accession to some other thing which has the character by nature of heritable or moveable; or

(3.) By destination, in respect of either accession or succession.

I. *Corporeal Things*—

(1.) *By Nature*—Land, trees, minerals, and generally things immoveable, are heritable; while everything that moves, or is capable of being moved from place to place, is moveable. So money, household furniture, plenishing, and goods of every description, stock-in-trade, farm stock and implements, ships and their furniture, and, generally, all subjects not attached to the soil, are moveable.(*l*)

(*g*) *Dolphin*, 4th August, 1859, 3 Macq. 563.

(*h*) *Allison*, 15th June, 1839, 1 D. 1025.

(*i*) *Arnott*, supra.

(*k*) 24 & 25 Vict. c. 121.

(*l*) Bell's Prin. § 1470; Ersk. 2,2,7; M'Laren, § 368; 17 & 18 Vict. c. 104.

(2.) *By Accession*—Houses, buildings, walls, &c., are heritable, as being attached to land; while trees, stones, minerals become moveable by separation: trees when cut down, stones when taken out of the quarry, minerals when brought to the surface.(*m*)

Industrial fruits are moveable, though still attached to the land; including not merely corns, but everything that is produced by skill and capital, as potatoes, turnips, &c.(*n*)

So also are shrubs and other perennial plants growing in a nursery for sale.(*o*)

Natural fruits of land are moveable when separated from the land.(*p*)

Machinery, fixtures, &c. As a general rule, a moveable subject is to be regarded as heritable—1. Where it cannot be disjoined without injury either to itself or to the heritable subject; or, 2. though less completely fixed (1) if it is essential or material to the use of the heritage, or (2) if there is a special adaptation in the construction of the personal subject to the use of the heritable subject which it would not have if it had been placed elsewhere, or (3) where there is an express declaration of the owner that the subject should be heritable (*q*). But where there is no intention of making the fixtures an accessory of the heritage these rules do not apply.(*r*)

It must be here kept prominently in view that the rules which regulate the character of these things arise in four different positions—as between

1. Heir and executor;
2. Fiar and executor of a liferenter;
3. Heritable and personal creditors; and
4. Landlord and tenant.

In a question of succession, the tendency has been to hold fixed machinery, &c., as attached to the land or building, and so to be heritable; but a more liberal interpretation would be given in favour of a tenant, by holding such machinery, &c., when erected by the tenant, rather as connected with the tenant's trade, and so to be moveable, and removeable by the tenant, than as part of the heritable subjects let.

(*m*) Bell's Com. 710.
(*n*) Stair, 2, 1, 2; Ersk. 2, 2, 4.
(*o*) *Begbie*, 15th Dec. 1837, 16 S. 232.
(*p*) Stair, 1, 4, 17.
(*q*) *Dowall*, 11th July, 1874, 1 R. 1180.
(*r*) *Dixon*, 6th March, 1843, 5 D. 775.

The following cases may be stated as examples of the distinctions here indicated(*s*):—

I. IN A QUESTION BETWEEN HEIR AND EXECUTOR.

1. *Things held to be Heritable.*

Large conservatory or greenhouse within garden; also, forcing-houses and vinery outside garden; also extensive iron fences in policy grounds.(*t*)

Fixed machinery for working minerals.(*u*)

Steam-engines bolted to log seats, which rested on brick foundations, but not fastened by any mechanical means; also, an underground railway, the rails being nailed to sleepers, and the sleepers laid upon the strata.(*v*)

Machinery in coal and iron works directly or indirectly attached to the ground, and capable of being removed either entire or in pieces; also, loose articles not physically joined, yet necessary for working the particular machinery, and not susceptible of being applied to other engines of the same kind.(*w*)

Salt-pans necessary to the possession of the inheritance.(*x*)

Pictures and glasses put up instead of wainscot, or where wainscot otherwise would have been put.(*y*)

Iron stoves.(*z*)

Furnace fixed with mortar to freehold.(*a*)

Furnace not fixed to walls, but to middle of house.(*b*)

2. *Things held to be Moveable.*

Telescope in an observatory.(*c*)

Spinning machines in a factory and attached to building for convenient use.(*d*)

Plants in a nursery garden kept for sale.(*e*)

Brewer's copper cauldron; also vats, utensils, and other machinery for trade.(*f*)

(*s*) Several of these examples are taken from Mr. Archibald Brown's excellent "Treatise on the Law of Fixtures."

(*t*) *Tod's Trs.*, 30th Jan. 1872, 10 Macp. 422.

(*u*) *Brand's Trustees*, 16th March, 1876, 3 R. (H. L.) 16.

(*v*) *Brand's Trustees*, 2nd Feb. 1878, 5 R. 607. These would be moveable in a question between landlord and tenant.

(*w*) *Dixon*, 6th March, 1843, supra.

(*x*) Lawton, 1; Black, H. 259.

(*y*) Cave, 3; Vern. 508.

(*z*) Goddard, 7; Mass. 432.

(*a*) 20 Hen. VII. c. 13.

(*b*) 21 Hen. VII. c. 26.

(*c*) *Tod's Trustees*, 30th Jan. 1872, supra.

(*d*) *Dowall*, 11th July, 1874, supra.

(*e*) *Gordon*, 2nd Dec. 1806, Hume, 188.

(*f*) *Fisher*, 17 Jur. 568.

Ranges, ovens, and set pots.(*g*)

Furnace, though fixed to freehold and purchased with same; also, hangings nailed to wall.(*h*)

Hangings, tapestry, and iron backs to chimneys.(*i*)

II. IN A QUESTION BETWEEN FIAR AND EXECUTOR OF LIFERENTER.

1. *Things held to be Heritable.*

Buildings of an agricultural nature.(*k*)

Wainscot, pictures, mirrors, tapestry in frames in a music-room and ante-room, and forming the visible walls and roof, and so attached thereto; kitchen range, ornamental vases in flower-garden and pleasure grounds; sashes of forcing-beds, with their frames.

Fixtures—Tile hearths laid on the hearthstone of a mansion, and bedded in cement, &c., and plants growing in the kitchen-garden.

2. *Things held to be Moveable.*

Steam-engine erected on a colliery by a tenant for life.(*l*)

Fire engines erected in a colliery.(*m*)

Bookcases, grates, brackets moveable, but gas-pipes heritable.(*n*)

Grates, gas brackets fastened in the ordinary way, and fireclay vases in the gardens, attached by stucco to stone parapet walls, and plants in pots which were bedded in the ground.(*o*)

III. IN A QUESTION BETWEEN HERITABLE AND PERSONAL CREDITORS.(*p*)

1. *Things held to be Heritable.*

Steam-engine and the large or fixed gearing of a mill.(*q*)

Leaden cisterns in a manufactory, incapable of being removed without being cut into pieces.(*r*)

Bell hung upon a frame, and fastened to it by a hasp, the frame being nailed to cupola of barn.(*s*)

(*g*) Wynne, 1 D. and R. 247.

(*h*) Squire Freem, 249; contrary to rule in Herlakenden, 4 Co.

(*i*) Harvey, 2; Stair, 1141.

(*k*) Buckland, 2 B and A. 54.

(*l*) Lawton, 1743; 3 Atk. 13.

(*m*) Dudley, Ambler, 113.

(*n*) *Stewart* v. *Douglas*, 1870 (noted in App. to Brown on Fixtures).

(*o*) *Nisbet and Others*, 20th Feb. 1880, 7 R. 575.

(*p*) Some of the cases cited under this head were between seller and purchaser.

(*q*) *Arkwright*, 3rd Dec. 1819, 20 F. C. 52.

(*r*) *Niven*, 6th March, 1823, 2 S. 270.

(*s*) Weston, 102; Mass. 514.

Machinery annexed to floor, ceilings, or sides of a building in a "*quasi* permanent manner" by means of bolts and screws, passed to the mortgagees: Held it made no difference that the object of the annexation was merely to steady the machines when in use, and that they could be removed without any injury to them or the freehold, nor that the machines were in the nature of trade fixtures, which would as between landlord and tenant belong to the tenant.(*t*)

Trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without any appreciable damage to the freehold.(*u*)

Looms in a worsted mill, and fixed to the floor by nails.(*v*)

Doors, windows, rings, keys.(*w*)

Stoves, grates, kitchen ranges, closets, shelves, brewing-coppers, cooling-coppers, mash-tubs, locks, bolts, blinds.(*x*)

A steam-engine and boiler.(*y*)

Staddles of stone pillars let into the earth; also, thrashing-machine placed inside a barn, with horse machinery outside, fixed by screws and bolts to posts let into the earth.(*z*)

2. *Things held to be Moveable.*

Small unfixed machinery of a mill.(*a*)

Wooden shed, tiled over and resting by its mere weight upon a wooden frame, which in turn rested on staddles of stone pillars let into the earth.(*b*)

Barn erected on pattens and blocks of wood, but not fixed in the ground; also, barn resting by its mere weight on a brick foundation; also, windmill not attached to the ground, but resting on cross traces laid upon brick pillars.(*c*)

IV. IN A QUESTION BETWEEN LANDLORD AND TENANT.

I. *Things held to be Heritable.*

Small trees in a garden; also, turf on terraces in garden.(*d*)

(*t*) Hellawell, 6 Ex. 295; 20 L. T. Ex. 154.
(*u*) Clunie, 3 Ex. 257; 4 Ex. 328.
(*v*) Holland, 7 C. P. 328.
(*w*) Lifford, 11 Rep. 50.
(*x*) Colegrave, 2 B. and C. 76.
(*y*) *Macgregor*, 13th June, 1860, 22 D. 1183.
(*z*) Wiltshear, 1 E. and B. 674.
(*a*) *Arkwright*, 3rd Dec. 1819, *supra*.
(*b*) Wiltshear *supra*.
(*c*) Brown on Fixtures, § 190.
(*d*) *Fleming*, 7th Dec. 1880, 8 R. 226.

The built part of a thrashing mill.(*e*)

Limekilns.(*f*)

Erections of brick and mortar, tiled and let into the ground.(*g*)

Bells left by a tenant.(*h*)

Hedges.(*i*)

2. *Things held to be Moveable.*

The moveable part of a thrashing mill.(*k*)

Trevises, rack, and manger in a temporary stable.(*l*)

A large counter, fixed by bolts to the floor of a shop, with shelves, drawers, dressers, and table, all fixed by wedges and grates built in.(*m*)

Certain parts of a machine which were put up by a tenant, and capable of being removed, and had been in use, to be valued by the out-going to the in-coming tenant.(*n*)

A pump erected by a tenant.(*o*)

Doors and windows of houses where local custom allowed tenants to remove.(*p*)

Buildings erected by a tenant of nursery ground.(*q*)

Wire fencing, wooden palings, and wooden folds erected by a tenant.(*r*)

Kitchen range, register stove, copper, and grates.(*s*)

Greenhouses, forcing-pits, and hot-bed frames.(*t*)

(2.) *By Express Destination* moveable subjects, such as jewels, arms, pictures, books, or furniture may be rendered heritable.(*u*) Stipulations in a lease between a landlord and a tenant as to the removal of machinery at the expiration of the lease will fix the character of such machinery in the tenant's succession.(*v*)

The right of heirship moveables is now abolished.(*w*)

II. *Incorporeal things*—

(1.) *By Nature*—personal debts, bank notes, bills, shares in public

(*e*) *Hyslop*, 18th Jan. 1811, 16 F. C. 143.

(*f*) Thresher, 4 D. and R. 62.

(*g*) Elives, 3; East, 38; William and William, 12; East, 209.

(*h*) Lyde, 1 B. and Ad. 394.

(*i*) Empson, 4 B. and Ad. 655.

(*k*) *Campbell*, 22d Feb. 1825, 3 S. 569.

(*l*) *Scott*, 1st Dec. 1824, 3 S. 344.

(*m*) *M'Knight*, 26th June, 1805, Hume, 412.

(*n*) Davis, 2 B. and A. 165.

(*o*) Grymes, 4 M. and P. 143.

(*p*) *Bell*, 14th June, 1814.

(*q*) *Sime*, 14th Dec. 1861, 24 D. 202.

(*r*) *Duke of Buccleuch*, 18th July, 1871, 9 Macp. 1014.

(*s*) Darby, 1 C. B. 895.

(*t*) *Syme*, 14th Dec. 1861, *supra*.

(*u*) *Baillie*, 21st May, 1859.

(*v*) *Dixon*, 6th March, 1843, 5 D. 775.

(*w*) Titles to Land Act, 1868, § 160.

or private companies, bank and all kinds of stock;(*x*) patent rights, copyright of books, pictures, and engravings are moveable;(*y*) also partner's share of the partnership stock, though it may partly consist of heritable property,(*z*) and no declaration in a contract of copartnery to the contrary will alter its character.(*a*)

(2.) *By Connection with Land.*—Feu-duties and casualties, rents of land and annuities are heritable; but arrears are moveable.

Formerly, as a general rule, money lent on heritable property, by being secured on heritage, was considered heritable, but, by the Titles to Land Act, 1868,(*b*) an important change on the law has been made regarding such securities. From and after the commencement of that Act, no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the special cases therein provided, be heritable as regards the succession of the creditor in such security, but shall be moveable; the exceptions being that, where executors are expressly excluded, the security shall be held to be heritable as regards the succession to that one creditor, and to be moveable thereafter,—the creditor having power to execute and record minutes in the forms in the schedule of said Act, excluding executors, and so fixing the character of heritable or moveable to such securities. By the same Act, it is expressly declared that all heritable securities shall continue to be heritable *quoad fiscum*, and as regards all rights of courtesy, terce, *jus relictæ* and *legitim*, competent to the husband, wife, or children of the creditor of such a security. This provision does not apply to securities in a foreign country; in the case of such securities, the *lex loci* governs the rule of distribution.(*c*) Annuities are heritable, but the accruing payments as they arise become moveable.

By the Apportionment Act, 1870,(*d*) it is provided that, from and after the passing of that Act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. The apportionment is given effect to

(*x*) Bell's Prin. §§ 1338, 1479.
(*y*) M'Laren, § 380.
(*z*) *Murray*, 5th February, 1805.
(*a*) *Irving*, 15th July, 1851, 13 D. 1367.
(*b*) § 117.
(*c*) *Monteith*, 28th June, 1882, 9 R. 982.
(*d*) 33 & 34 Vict. c. 35.

when the next periodical payment takes place. The heir or other person who, if the rent had not been apportioned under the Act or otherwise, would have been entitled to such entire or continuing rent, collects the rent, and accounts to the executors or other parties for the apportioned part of the rent due at the death or expiry of the predecessor's title.

(3.) *By Destination.*—Directions by a proprietor to sell heritable subjects and convert them into money make the price moveable.(*e*) Implied directions have the same effect.(*f*) But converted heritage remains subject to claims of heir and to terce and courtesy(*g*); and converted moveables to *legitim* and *jus relictæ*.(*h*) The fact of collation does not alter the character of property from heritable to moveable, unless where the property is actually sold.(*i*) Personal bonds which do not exclude executors are moveable as to succession, but heritable as to fisk and *jus relictæ*.(*k*)

84. Who are Termed "Next-of-Kin."—The expression *next-of-kin* means those relations who are entitled to the moveable estate of an intestate. It does not denote any special degree of relationship, but merely that which is next in the order of succession.(*l*) And in that order some may be nearer, and some more remote, in degree to the intestate.(*m*)

Kinship is of two species:—(1) Consanguinity; and (2) Affinity. Affinity is the relationship which arises by marriage between a husband and the relations of his wife, or a wife and the relations of her husband. These relations stand in the same degree to the husband as to the wife, and *vice versa*. There is no affinity between the relations themselves,(*n*) and no succession in the law of Scotland by affinity, except to the extent and effect stated below.(*o*)

Consanguinity, again, is the blood relationship between persons descended from the same stock. It is divided into three lines or orders—namely, the descending line, the transversal or collateral line, and the ascending line. It may be said to be of two kinds—namely, direct (including the ascending and descending lines), and collateral.

(*e*) *M'Gilchrist*, 8th March, 1870, 8 Macp. 689.
(*f*) M'Laren, §§ 413, 423.
(*g*) M'Laren, § 441; Bell's Prin. § 1598.
(*h*) M'Laren, § 442.
(*i*) *Hodge*, 22nd November, 1879, 7 R. 259.
(*k*) 1661, c. 32; Ersk. 2, 2, 10.
(*l*) *Webster*, 25th Oct. 1878, 6 R. 102.
(*m*) 18 Vict. c. 23.
(*n*) Ersk. 1, 4, 8.
(*o*) §§ 87, 88.

Every line of consanguinity is divided into degrees which are so called by comparison with steps, because one degree is below the other, and one springs from the other. And every filiation or generation is a degree.

These lines may be illustrated thus :—

(1.) Descendants — *i.e.*, persons descended from one common ancestor, as child, grandchild, great-grandchild, and so on downwards, in the direct descending line. The son of *A* being related to him in the first degree ; his grandson in the second ; his great-grandson in the third, and so on. This is the only natural way of reckoning the degrees in the direct line, and, therefore, universally obtains as well in the civil and canon as in the common law.(*p*)

(2.) Collaterals—*i.e.*, persons reckoned sidewise either from the intestate himself or from a fraternal ancestor—as brothers and sisters, uncles and aunts, and such as are descended from them. Thus, if *A*, who has issue, has two brothers who have each also issue, their issue and his issue are lineally descended from his father, their common ancestor ; and the three issues are, therefore, collateral.

(3.) Ascendants—*i.e.*, persons in the degree of kindred reckoned upwards—as father, grandfather, and so on upwards, as high as evidence can reach. The degrees are reckoned in the same way as among descendants.

The following diagram shows these lines in one view :

	Lineal Kindred.	Collateral Kindred.		
Ascending Line.	Great Grandfather			
	Grandfather			Great Uncle
	Father		Uncle	Great Uncle's Son
	Intestate	Brother	Cousin-german	Second Cousin
Descending Line.	Son	Nephew	Cousin-german's	Second Cousin's Son
	Grandson	Nephew's	Son	
	Great Grandson	Son		

In moveable succession, the question of kindred may be raised either in the court of the domicile, or in that of the place where the subjects are situated and sought to be recovered ; but, in

(*p*) Allnutt, p. 176 ; Ersk. 1, 6, 8 ; Bell's Prin. § 1647.

heritable succession that question can only be raised in the court of the situation of the estate.(*q*)

85. Who are Full Blood Relations.—Full blood relations are persons born or descended of the same father and mother.(*r*) In the Intestacy Act, 1855, they are styled german relations.

86. Who are Consanguinean Relations.—These are persons descended from the same father, but not the same mother, and are sometimes styled half-blood consanguinean.(*s*) Among descendants, no distinction obtains between these and the full blood; but among collaterals, these half blood succeed *after* the full blood, there being a total exclusion of the half blood in competition with the full blood in the same degree of succession (*t*)—*e.g.*, if an intestate leave a brother consanguinean and a nephew by a brother-german, the nephew, though more remote by one degree, will take the succession. Consanguinean relationship is reckoned to extend as far as the evidence of propinquity can reach.(*u*)

87. Who are Uterine Relations.—These are persons descended from the same mother, but not the same father, and are sometimes styled half-blood uterine.(*v*) Formerly there was no succession by such persons to the full blood; nor was any relationship recognised between the consanguinean and the uterine, or succession *ab intestato* of the one to the other, or even, in the case of uterine relations, to one another.(*w*) But, by the Intestate Moveable Succession Act, 1855,(*x*) it is provided that where an intestate, dying without leaving issue, whose father and mother have both predeceased him, shall not leave any brother or sister-german or consanguinean, nor any descendant of a brother or sister-german or consanguinean, but shall leave brothers and sisters-uterine, or a brother or sister-uterine, or any descendant of a brother or sister-uterine, such brothers and sisters-uterine, and such descendants in place of their predeceasing parent, shall have right to one half of his moveable estate. By the Married Women's Property Act, 1881, the moveable estate of a wife is vested in herself, and, on her death intestate, her children, in addition to taking legitim, take the residue of the estate, under deduction of a share to the

(*q*) M'Laren, § 38.
(*r*) Bell's Prin. § 1651. *Mitchell*, 14th Dec. 1872, 10 S. L. R. 149.
(*s*) Bell's Prin. § 1654.
(*t*) *Ibid.* § 1653.
(*u*) Bell's Prin. § 1652; Ersk. 3, 9, 2.
(*v*) Bell's Prin. § 1654.
(*w*) Ersk. 3, 8, 8; Bell's Prin. § 1654.
(*x*) 18 Vict. c. 23.

husband; and it would seem that her children of whatever marriage can succeed to her and to each other.

88. Who are Maternal Relations.—Formerly there was no succession by affinity or relationship by marriage (*y*): thus a husband and wife never succeeded to each other, nor could the separate relations of the one succeed to those of the other, but important amendments of the law have been introduced of late years. By the Act 18 Vict. c. 23, "where an intestate, dying without leaving issue, whose father has predeceased him, shall be survived by his mother, she shall have right to one-third of his moveable estate, in preference to his brothers and sisters or their descendants, or other next-of-kin of such intestate."

The same Act, as noticed in the previous section, also gives to the uterine collaterals of the intestate right to one-half of his moveable estate if all his german or consanguinean collaterals be dead.

Another change in the law has been introduced by the Married Women's Property (Scotland) Act, 1881, by which after the passing of that Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be.

Barring these statutory exceptions, the principle still remains that affinity or relationship by marriage gives no right to a share of an intestate's estate. So if A have a son and daughter, B and C, and they both predecease him, the former survived by a wife and the latter by a husband, neither of such wife nor husband has any legal claim on the estate of A.

89. Goods in Communion, or *Communio Bonorum*.—This phrase is generally made use of by the Institutional writers as denoting the moveable property belonging in common to both spouses, of which the husband during the subsistence of the marriage has the uncontrolled management, but in which, upon his death, the widow and children have certain indefeasible rights.

In the ancient law of Scotland no mention is made of this

(*y*) Ersk. 3, 8, 9, and 3, 9, 2.

doctrine, and there is no evidence of the word *communio* being known in Scottish legal nomenclature until the seventeenth century.(*z*)

The doctrine is stated by Lord Stair thus(*a*):—"By our custom, without any voluntary contract, there arises betwixt husband and wife a communion of all moveables, except the habiliments and ornaments of the wife's body. . . . The husband hath the full and sole administration of all moveable goods belonging to or accresceing to the wife during the marriage. . . . From this communion of goods it follows also that there is a communion of debts whereby the husband is liable for the wife's debts. . . . And after the dissolution of the marriage" the goods in communion suffer a division.

Professor Erskine says(*b*):—"A man and woman, by entering into marriage, are joined in the strictest society or copartnery, which necessarily draws after it a communication of their mutual civil interests (as far as necessary for preserving the society) styled in our law the communion of goods. . . . The husband has the sole right of administering the society goods. . . . He can sell, and even gift at his pleasure, the wife's whole moveable subjects by any deed that is to take effect during the marriage, and the creditors may attach them as his for their payment. So that marriage carries all the character of a legal assignation by the wife in favour of her husband of her whole moveable estate," subject to the debts contracted by the wife before the marriage, for which the husband becomes responsible.

Professor Bell says(*c*):—"The *communio bonorum* comprehends . . . generally the whole personal estate, with two exceptions: (1) of such effects as have been given to the wife expressly excluding the *jus mariti*; and (2) of paraphernalia, in regard to which the *jus mariti* is by implication excluded."

Of late years the origin, nature, and extent of the *communio bonorum* have been the subject of much criticism, and although the phrase has been frequently employed by the Court in determining the mutual rights of married persons,(*d*) there now appears to be a general concurrence of opinion that since the passing of the Moveable Succession Act, 1855, which took away the right of

(*z*) 1 Fraser, 656.
(*a*) Stair, 1, 4, 13 *et seq.*
(*b*) Ersk. 1, 6, 12.
(*c*) Bell's Com. 1, 678.
(*d*) *Muirhead*, 6th Dec. 1867; *Smith*, 5th June, 1869; *Fraser*, 21st June, 1872; *Thomson & Others*, 9th July, 1879.

the wife to transmit to her representative any share of the united moveable estate, it is inapplicable to the existing state of matters.

In Muirhead's case,(*e*) Lord Curriehill said:—"We must guard against being misled by the manner in which the expression *communio bonorum* is occasionally made use of, from which an idea appears to have arisen that these words denote a kind of partnership capital, of which the husband is merely the administrator for behoof of his wife and children as well as of himself. Unquestionably the wife and children may have ultimate interests of very great importance in the effects belonging to the head of the family, but during the marriage he is absolute proprietor of the whole moveable estate with unlimited powers of administration. It is not until his death that any division of the property takes place, and that which then forms the subject of division is his executry estate, one-third of which belongs to the widow *jure relictæ*."

Dr. (now Lord) Fraser, in his able work on the "Domestic Relations," traces the law on the subject through all its modifications from early times, and contends that "the doctrine has been condemned as a fiction, illusory—a mere name." Commenting on the theory held by several institutional writers that the *communio* is "composed of three partners,—the wife, the husband, and the children," Dr. Fraser says:—"The *jus relictæ* and *legitim* are in all respects the same: that they are mere casual contingent rights during the subsistence of the marriage, existing then only in hope, and coming into proper rights merely at its dissolution: they are not rights of division of a fund already held in common, but rights of *debt* against the husband's executors, constituting the widow and the children creditors, whose rights come into being by the husband's death, and secondary creditors too, for all other debts must be paid before them."(*f*)

In Fraser's case,(*g*) the Lord President said:—"All we know of the *communio bonorum* is that when the husband predeceases the wife, the wife is entitled, *jure relictæ*, to one-third, or one-half of the husband's moveable estate, or of his free executry; and until the law was altered by a recent statute, that when the wife predeceased the husband and left no children, the next-of-kin of the wife were entitled to claim one-half of that moveable estate, or, as it was called, the goods in communion. That right of the executors of

(*e*) 6th Dec. 1867, 6 Macp. 95.

(*f*) Fraser, 1, 671, and cases there cited.

(*g*) 21st June, 1872, 10 Macp. 837.

the wife has been abolished by the Statute, whether she dies testate or intestate; and therefore the only practical result of the *communio bonorum*, if indeed it be a result of that at all, is the *jus relictæ*."

In the same case Lord Kinloch said:—"It is in vain to say that during the subsistence of the marriage, a society or partnership, or anything resembling it, exists between the spouses. The whole belongs to the husband. To call any part of the effects the wife's own during the marriage is a legal solecism. But as soon as the marriage is dissolved by the death of either party, there arises, or at least arose until the recent Statute, a right to both to share in the moveable estate, which previously were exclusively the husband's. When the wife predeceases without children existing, she had till the recent Statute a right to transmit one-half to her legal representatives. When the husband predeceases, she had and still has a right to one-half as *jus relictæ*. These two rights include the whole of any participation in the moveable estate ever competent to the spouses by our law. It is to the effect of comprehending these rights, and to no other effect whatever, that the phrase *communio bonorum* can ever be legitimately employed. If indicating anything more, the phrase has been illegitimately used. It has been reasonably suggested that the phrase came to be employed as a supposed philosophic exponent of the rights arising at dissolution; and that so far from a *communio bonorum* giving rise to the rights emerging at dissolution, it was the existence of these rights which brought the phrase *communio bonorum* into use. At all events nothing else was ever legally comprehended under that name except the two rights referred to. *Communio bonorum* in the law of Scotland means these two rights and nothing more."

It would thus appear that the *communio bonorum* is a legal fiction originally introduced into the law of Scotland to account for two rights—the *jus relictæ*, if the wife survived her husband, and the right of the wife's next-of-kin to one-half of the moveable estate, if she predeceased him.

The latter right having been abolished by the Moveable Succession Act, 1855, the former—the *jus relictæ*—now alone remains. Whether this right of *jus relictæ* can be strictly held to account, even in part, for the introduction into our law of the doctrine of *communio bonorum*, is a question now of no practical importance. It may be doubted if the right can be regarded even as a *result* of the doctrine, unless the right of legitim be likewise so regarded, seeing both rights arise in the same manner, and are subject to

the same rules of law in relation to amount, exclusion, discharge, or satisfaction.

If the doctrine were to be held to still apply to the moveable estate of both spouses, in cases where the *jus mariti* is not excluded, it would also apparently now apply with equal reason to the wife's separate moveable estate, in cases where the *jus mariti* is excluded.

This seems to be a natural result of the provisions of the Married Women's Property Act, 1881, which practically abolishes the *jus mariti*, and provides "That from and after the passing of that Act (1) the husband of any woman who may die domiciled in Scotland shall take, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be; and (2) the children of such married woman, on her death, shall have right to the same amount of *legitim* out of her moveable estate as is payable to them out of their father's moveable estate.

90. *Jus Mariti* and Right of Administration of Husbands.—1. *Jus Mariti* is a beneficial right to the moveable estate of the wife, which, until the passing of the several statutes previously noticed,(*h*) uniformly arose to the husband at common law on the celebration of the marriage.

The *right of administration* is a curatorial right, which similarly arose to him on the celebration of the marriage in regard to such property of the wife as did not fall under his *jus mariti*.

Both rights have been considerably modified by recent legislation; but as in certain circumstances they still exist, we shall briefly notice their extent and effect under the former law, and their subsequent modification.

I. *Law previous to recent Legislation.*(*i*)

The *jus mariti*, where not excluded by law, or by any of the methods to be immediately noticed, operates as a transference to the husband, from the time of the marriage, of the whole moveable property then vested and to vest in the wife during the marriage.

This right is sometimes confounded with the right of adminis-

(*h*) § 78. | (*i*) See legislation noted in § 78.

tration. *E.g.*, in Bell's Dictionary, it is stated to be "the uncontrolled power of administration of the goods in communion vested in the husband;" while Professor Erskine says: "The husband hath by the law of Scotland the sole right of administering the society goods. This right gets the name of *jus mariti*."(*k*) Again Professor Bell says: "The *jus mariti* is not a liferent in the husband, but the power of administering the wife's estate, reaping the fruits and taking the rents during the subsistence of the marriage."(*l*) Plainly these definitions are not strictly correct. The *jus mariti* is a right quite distinct from the right of administration. The latter is merely a right to manage the wife's personal estate, while the former makes him practically master of that estate. The *jus mariti* is in fact a right of property. The transference is absolute without any legal process. In virtue of it the husband can, in his own name, and without the wife's consent, sue for, recover, and discharge, all moveable property due to the wife by third parties; and, even when he has been divorced in respect of his own adultery, he is entitled to sue for money to which his wife succeeded before the divorce(*m*); and he can sell, and even gratuitously dispose of, such property at his pleasure by any act or deed to take effect during his lifetime(*n*).

The only moveable property of the wife that does not, at common law, fall under the *jus mariti* are her wearing apparel, the chests or wardrobe for holding the same(*o*), and the ornaments proper to her person, termed *paraphernalia*(*p*); all which remain at her own disposal by will, and cannot be attached for the husband's debts(*q*). But, on the other hand, a wife may not sell or pledge these articles without her husband's consent.

In Cameron's case, Lord Deas, in delivering the judgment of the Court, said that the law as to what was *inter paraphernalia* was clearly understood, and he took it to be this:—"*First*, that those articles are in their nature paraphernal which are adapted for the use and enjoyment of the female spouse as distinguished from promiscuous use; *second*, that articles of promiscuous use may be made paraphernal by being gifted to the wife before or on the day

(*k*) Ersk. 1, 6, 13.
(*l*) Com. 1, 59.
(*m*) *Ferguson*, 30th Jan. 1877, 4 R. 393.
(*n*) Bell's Prin. § 1561; Ersk. 1, 6, 13; Bell's Lect. §§ 122, 792.
(*o*) *Cameron*, 5th Feb. 1876, 13 S. L. R. 278.
(*p*) Bell's Prin. § 1555.
(*q*) Ersk. 1, 6, 15; *Young*, 19th May, 1880, 7 R. 760.

of the marriage, either by the husband or by friends, and either by express or implied gift, if they are not out of keeping with the rank of the recipient."

In determining what subjects belonging to the wife *at the date of the marriage* fall under the *jus mariti*, regard must be had to the character of the property as at that date. For example, if, at the date of the marriage, the property was a sum of money, moveable, it would fall under the *jus mariti*, though it had previously been heritable; on the other hand, if the property at that date were heritable, it would not so fall under the *jus mariti*, unless the wife consented to the change with that view; so, also, where the wife, *during marriage*, succeeds to property, or acquires it by gift, the character of the property will be fixed at the date of its vesting in the wife, and no administration of it by trustees or executors can affect its character in a question with the husband(*r*). A bond heritably secured, to which a married woman succeeded as next-of-kin of the creditor, was held not to fall under the *jus mariti*.(*s*) But if a wife succeeds to heritable property conveyed by the testator to trustees with directions to sell before conveying to the wife, such property will fall under the *jus mariti*.(*t*) Where the wife herself during marriage sells her heritable property, with no intention to re-invest the proceeds on such property, it will fall under the *jus mariti;* but it will not so fall if the change be made with a view to obtaining another heritable investment.(*u*)

The right of the husband to the wife's moveable property is so strongly founded in law, that, in order to exclude it, the intention must be made quite clear. The presumption of law is in favour of the right; and the right continues, notwithstanding the husband's bankruptcy, or even the voluntary or judicial separation of the spouses (*v*); but it may be excluded in either of the following ways:—

(1.) The husband may, *before marriage*, renounce it by deed, either wholly, or as to a particular subject.(*w*) *After marriage*, a husband, though perfectly solvent, cannot, in a question with his creditors, renounce his *jus mariti*.(*x*)

(2.) The wife may, by antenuptial contract or other deed executed

(*r*) Ersk. 1, 6, 13; Fraser, 1, 689.
(*s*) *Hodge*, 22nd Nov. 1879, 7 R. 259.
(*t*) Fraser, 1, 373.
(*u*) Ersk. 2, 2, 16.
(*v*) Fraser, 1, 403.
(*w*) Bell's Lect. p. 124.
(*x*) *Shearer*, 18th Nov. 1842, 5 D. 132.

before marriage, reserve her property by vesting it in trustees or otherwise for her behoof, exclusive of the *jus mariti*.(*y*)

(3.) A third party may, *either before or during marriage*, convey property to the wife, or to trustees for her behoof, in terms importing an exclusion of the *jus mariti*.(*z*)

An exclusion of the *jus mariti* in general terms is held to apply to both principal and interest, and may be made to apply to property already acquired and to be acquired by the wife.(*a*) Where excluded with regard to a provision under a will, the exclusion was held to extend to the residue of the estate.(*b*)

The property secured to a wife exclusive of the *jus mariti* is termed "*peculium*."

2. *Right of Administration.*—This is not a right of property, but a right to manage such property of the wife as does not fall under the *jus mariti*. In virtue of it the husband's consent must be obtained to every act of administration in regard to the wife's property; and, should he refuse, the Court would, on cause shown, authorise the wife to act without him, or name another curator. The principle of the right implies that it must be exercised solely for the wife's behoof, and to save her from being hurt by her own acts.(*c*)

The effect, therefore of excluding the *jus mariti* without excluding the right of administration is, that a wife is entitled to insist that all her property shall be applied for her own behoof; but she can do no act of administration in regard to such property without consent.(*d*) The right of administration cannot be attached by creditors of the husband (*e*); and it may be excluded only "in case of the event of the husband's insolvency," leaving it intact till that contingency happens.(*f*)

Where the *jus mariti* and right of administration are both excluded, the wife may deal with her property as she pleases. She may invest the same in trade, and thereby incur personal obligations which will be effectual against her personal estate, but not against herself or her husband.(*g*) But if the husband be unable to

(*y*) Ersk. 1, 6, 13.

(*z*) M'Laren, § 1499; *Wilson*, 20th Nov. 1868, 7 Macp. 136.

(*a*) *Hutchison*, 10th June, 1842, 4 D. 1399; *Biggart*, 15th Jan. 1879, 6 R. 470.

(*b*) *Bryce and Others*, 2nd March, 1878, 5 R. 722.

(*c*) *Bryce and Others, supra.*

(*d*) Fraser, 1, 417; Bell's Lect. pp. 122, 794; *Bryce's Trustees*, 2nd March, 1878, *supra.*

(*e*) *Crawcour*, 3rd Feb. 1844.

(*f*) *Annand*, M. 5844.

(*g*) *Biggart*, 15th Jan. 1879, *supra.*

aliment the family, she is bound to do so out of her own estate; and it would appear that, even if the husband's means be adequate for that purpose, she is bound to contribute to the family expenses.(*h*)

Where a wife is deserted by her husband, or is living apart from him with his consent, or is living apart from him under a judicial separation, the marital rights of the husband remain intact, at common law, as regards the wife's moveable estate; but the law has now been altered by the Conjugal Rights Act, 1861.(*i*)

II. *Changes introduced by Recent Legislation.*(*k*)

Such was the law till the recent and extensive changes introduced by the Conjugal Rights (Scotland) Amendment Act, 1861,(*l*) and subsequent legislation.(*m*)

These changes we shall here notice in their order.

(1.) *Exclusion of the* Jus Mariti *and Right of Administration in Cases of Desertion and Separation.*

By the Conjugal Rights (Scotland) Amendment Act, 1861,(*n*) a wife deserted by her husband may apply to any Lord Ordinary of the Court of Session, or in time of vacation to the Lord Ordinary on the Bills (extended by the Conjugal Rights (Scotland) Amendment Act, 1874,(*o*) to the Sheriff and his substitute) for an order to protect property which, after such desertion, she has acquired or may acquire by her own industry, or which she may succeed to, against her husband, his creditors, or any one claiming right through him; upon the granting of which Order of Protection such property shall be held to belong to her as if she were unmarried. Such Order of Protection "shall have the effect of a decree of separation *a mensa et thoro* in regard to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued."

In case of separation, after a decree of separation *a mensa et thoro* obtained at the instance of the wife,(*p*) all property which

(*h*) Fraser, 1, 419.

(*i*) 1 Fraser, 780.

(*k*) See legislation noted in § 78.

(*l*) 24 & 25 Vict. c. 86.

(*m*) These statutes are printed in full in the Appendix, with notes of decided cases, &c.

(*n*) Came into operation 1st Nov. 1861.

(*o*) 37 & 38 Vict. c. 31.

(*p*) Where the husband has obtained judicial separation against the wife, the *jus mariti* still remains under this Act (Fraser, 1, 780). A voluntary separation is not a renunciation of the *jus mariti* (Stair, 1, 4, 17).

she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, from which the *jus mariti* and husband's right of administration are excluded; and such property may be disposed of by her in all respects as if she were unmarried; and on her death intestate the same passes to her heirs as if her husband had been dead; and, while so separate, the wife shall be capable of entering into obligations, be liable for wrongs and injuries, and be capable of suing and of being sued as if she were not married; the husband not being responsible for the debts or deeds of his wife so separated, excepting that where aliment has been awarded to her, and the same is not paid, the husband shall be liable for necessaries supplied for her use.

(2.) *Provision for Married Women out of Property vested in them by Succession or Donation.*

By § 16 of the same Act,(*q*) when a married woman succeeds to property, or acquires right to it by donation or bequest, or otherwise than by her own industry, the same shall not be claimable by the husband, his creditors or assignees, as falling within the *communio bonorum* or under the *jus mariti* or the husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife; such claim on the part of the wife being only competent if made prior to actual possession by the husband, or before decree of furthcoming, or poinding and sale duly reported by a creditor. This 16th section was held to be retrospective in *Taylor*, 23rd June, 1871.(*r*)

(3.) *Exclusion of* Jus Mariti *and Right of Administration over Wife's Wages and Earnings.*

By Act 40 & 41 Vict. c. 29,(*s*) the privileges of married women are still further extended in regard to the holding of property exclusive of their husbands. Under it all wages and earnings acquired by women after the commencement of the Act in any employment, or any business carried on in their own name, and all property acquired by them through skill, with all investments

(*q*) Conjugal Rights (Scotland) Amendment Act, 1861.

(*r*) See the following cases as to what constitutes a "reasonable provision":—*Somner*, 2nd March, 1871, 9 Macp. 594; *Ferguson*, 7th Nov. 1871, 10 Macp. 54; *Taylor*, 28th Oct. 1871, 10 Macp. 23.

(*s*) Came into operation 1st Jan. 1878.

thereof, remain absolutely their own, and their own receipts are a good discharge therefor.

(4.) *Limitation of Husband's Liability for Antenuptial Debts of Wife.*

By § 4 of the last-mentioned Act,(*t*) the liability of husbands for their wives' antenuptial debts, in marriages taking place after the commencement of the Act, is limited to the amount of the property received through the wives.

There is a recent decision under this section in the case of Wishart,(*u*) where a wife at the date of her marriage held stock in a public company which stopped payment within a fortnight after the marriage; and it was held that the wife's obligation to the company was an ante-nuptial debt, and that the husband was not responsible if he surrendered any property acquired by him through his wife.

(5.) *Policies of Insurance by or in favour of Married Women.*

By the Act 43 & 44 Vict. c. 26,(*v*) a married woman may effect an insurance, either on her own life or the life of her husband, for her separate use; and, if expressed as for her separate use, the same shall immediately vest in her exclusive of the *jus mariti* and right of administration of her husband, and be assignable by her without his consent. A married man may also effect an insurance on his own life in trust for his wife and children; and the same shall be irrevocable and binding against creditors, unless it shall be proved that the policy was effected and the premiums paid, with intent to defraud creditors, or unless the person upon whose life the policy is effected shall be made bankrupt within two years; in which cases it shall be competent to the creditors to claim repayment of the premiums.

(6.) *Virtual Abolition of* Jus Mariti *and Curtailment of Right of Administration.*

The Married Women's Property (Scotland) Act, 1881,(*w*) in cases not superseded by marriage contract, makes great changes on the former law regarding the *jus mariti*, where the husband at the time of the marriage was domiciled in Scotland.

(*t*) 40 & 41 Vict. c. 29.
(*u*) 14th March, 1879, 6 R. 823.
(*v*) Came into operation 26th Aug. 1880.
(*w*) 44 & 45 Vict. c. 21.

(1.) *In marriages contracted after the date of the Act,*(*x*) where the husband at the time of the marriage had his domicile in Scotland, the *jus mariti* is abolished altogether; and the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the *jus mariti.*

Any income of such estate shall be payable to the wife on her individual receipt, and to this extent the husband's right of administration shall be excluded; but the wife shall not be entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate.

Where such moveable estate of the wife shall be kept in her own name, or be kept separate and distinguishable from her husband's estate, the same shall not be subject to arrestment or diligence for the husband's debts.

But any money or other estate of the wife lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, reserving the wife's claim to a dividend or ranking, after the claims of creditors for valuable considerations have been satisfied.

The *jus mariti* and right of administration of the husband are excluded from the rents and produce of the wife's heritable property in Scotland.

The practical effect of these provisions is to exempt the moveable property of married women from the husband's creditors and from the effects of bankruptcy.

(2.) *In marriages contracted before* 18*th July,* 1881, the foregoing provisions apply to all property coming to the wife after that date, except where, before that date, the husband shall have made a reasonable provision for the wife, in the event of her survivance, by irrevocable deed.

It is competent for spouses, by mutual deed, advertised and registered, to bring the wife's whole estate, whether acquired before or after the date of the Act, under the provisions thereof.

Where a wife is deserted by her husband, or is living apart from him with his consent, the Court, on application, may dispense with the husband's consent to any deed relating to her estate.

The Act further expressly exempts from its operation—

(*x*) 18th July, 1881.

Any contracts made or to be made "between married persons *before* or *during* marriage."

The law relating to such contracts.

The law relating to donations between married persons.

The law relating to a wife's non-liability to diligence against her person.

Any of the rights of married women under the said Act, 40 & 41 Vict. c. 29.

It will thus be seen that the leading provisions of these Acts relate to the curtailment of the *jus mariti* and to the adoption of means for rendering the wife independent of her husband in the possession of her moveable estate.

The last of these Acts is the most sweeping of the series in this respect. It deals with the *jus mariti* as well in regard to marriages contracted *before* as to marriages contracted *after* its passing. But as regards marriages of the latter class the Act provides as a condition of the abolition of the *jus mariti* that "the husband shall at the time of the marriage have his domicile in Scotland."

In view of this proviso as to domicile, it may be useful to glance—(1) at the manner in which the *jus mariti* is held to come into existence; and (2) the residence required in Scotland to enable a person to contract a valid Scotch marriage.

It is beyond question that the *jus mariti*, where not affected by the recent statutes,(*y*) comes into existence at the moment of solemnisation of the marriage. Stair says: "The rights arising from marriage are the *jus mariti*,"(*z*) and again "all the wife's moveable goods and sums become the husband's by the marriage, except her paraphernalia."(*a*) "The marriage without any contract is a legal assignation to the rents and profits of the wife's lands."(*b*) Erskine says: "The husband acquires by his marriage a right to the moveable estate belonging to the wife."(*c*) And he defines the right as "accruing from the marriage to the husband in the wife's moveable estate."(*d*) Professor Bell states the law to the same effect.(*e*) Lord Fraser says the *jus mariti* is called into being by the mere fact of the marriage having been validly contracted in Scotland.(*f*)

(*y*) § 78.
(*z*) 1, 4, 3.
(*a*) 1, 4, 17.
(*b*) 1, 4, 13.
(*c*) 1, 6, 16.
(*d*) 1, 6, 13.
(*e*) Bell's Com. 1, 59; Bell's Lect. 1, 792.
(*f*) 1, 679

Thus at common law the *jus mariti* comes into existence immediately the marriage takes place.

Then as to the contraction of a marriage. In Scotland a marriage may, as regards the ceremony, be contracted by either of two methods, known as regular and irregular. Where the latter method is adopted "one of the parties must at the date of the marriage have his or her usual place of residence in Scotland, or have lived there for twenty-one days preceding the marriage."(*g*) And where the former is adopted, if the marriage is preceded by proclamation of banns, six weeks' residence in the parish or district is required of each person, but if preceded by a notice to the Registrar under the Marriage Notice Act, only fifteen days' residence is required.(*h*)

There is thus no statutory provision to the effect that a man must have a legal domicile in Scotland to enable him to contract a valid marriage there; consequently a man may validly enter into marriage in Scotland and thereafter reside there without being affected by the Married Women's Property Act, 1881.

This is only one of several of the peculiar features of this unique piece of social legislation. Others will be noticed in footnotes to the Act itself in the Appendix. Here it need only further be remarked that the Act exempts from its provisions "antenuptial contracts of marriage," as well as "any contracts made or to be made between *married* persons *before* or during marriage."

The reason assigned in the preamble of the Act for bringing the Act into existence is that it was expedient to protect the property of married women in Scotland further than was done by the Act 40 & 41 Vict. c. 29, already noticed. This latter Act again bears that it shall not affect the rights conferred upon a married woman by the Conjugal Rights Act, 1861 and 1874. These four Acts have therefore to be read together.

This being so, the *jus mariti* and right of administration may now be affected either wholly, or partially, or one may be affected and the other not, or neither may be affected at all.

It is hardly possible therefore to give a concentrated view of the operation of these two rights, but in a general way the following abstract of the provisions which directly affect them may be useful.

(*g*) 19 & 20 Vict. c. 96 (1856).

(*h*) 41 & 42 Vict. c. 43 (1878); Barclay's Digest. Title Banns.

ABSTRACT.

Affecting Statutes.	Property Affected.
24 & 25 Vict. c. 86.	Moveable property acquired through wife's own industry or by succession, and of which husband has not obtained possession, nor his creditors have attached.
Same.	All moveable property acquired and devolving on wife after decree of separation *a mensa et thoro*, obtained at instance of wife.
Same.	Moveable property acquired by wife by succession, donation, bequest, or otherwise than by her own industry.
40 & 41 Vict. c. 29.	Wages and earnings of wife, from any employment, trade, or business carried on in her own name; also money or property got by her through exercise of literary, artistic, or scientific skill.
Same.	Moveable property received by husband in right of his wife.
43 & 44 Vict. c. 26.	Policies of assurance.
*44 & 45 Vict. c. 21.	**1. As to Marriages con-** Wife's whole moveable estate acquired as well before as during marriage.
Same.	Income from wife's moveable estate.
Same.	Rents of wife's heritable property in Scotland.
Same.	**2. As to Marriages con-** Wife's whole moveable estate acquired as well before as during marriage.
Same.	Wife's whole "estate, moveable or heritable, and income thereof," acquired *after* date of Act.

* This Act does not exclude the power of settlement by antenuptial contract; before or during marriage.

Effect of Statutory Provisions.	Dates from which Property Affected.
Wife may apply to Court for Protection Order. Order to render wife as if unmarried, and have effect of decree of separation *a mensa et thoro* as to property rights and obligations of spouses and to wife's capacity to sue and be sued.	1st Nov. 1861.
Decree of separation to vest property in wife as if unmarried. While living separate, she to be liable for wrongs and injuries, and capable of suing and being sued. Husband's marital rights not affected where he is the petitioner for separation.	Same.
Wife entitled to claim reasonable provision therefrom, if property not previously fallen into husband's possession, or attached by his creditors.	Same.
Jus mariti and right of administration excluded.	1st Jan. 1878.
Husband's liability for wife's antenuptial debts limited to amount of property received through her.	Same.
Jus mariti and right of administration excluded, if policy effected by wife on her own or on her husband's life for her own use; policy effected by husband on his life, and expressed to be for benefit of wife or children, not available to his creditors on lapse of two years.	26th Aug. 1880.
tracted *after* date of Act.	
If husband, at date of marriage, domiciled in Scotland, *jus mariti* excluded, but not right of administration.	18th July, 1881.
Right of administration excluded, but wife cannot assign prospective income or dispose of her moveable estate, without husband's consent.	Same.
Jus mariti and right of administration excluded.	Same.
tracted *before* date of Act.	
Jus mariti not excluded, provided husband has made a reasonable provision to wife previous to marriage by irrevocable deed.	Same.
Jus mariti and right of administration excluded.	Same.

and it exempts from its operation contracts made or to be made by the parties

91. ***Jus Relictæ.***(*i*)—Where a marriage is dissolved by the death of the husband, a right arises to the widow to a share of the husband's free moveable property, wherever situated,(*k*) provided he died domiciled in Scotland.(*l*) This right is technically called *jus relictæ*. Its amount depends on the extent of the husband's free moveable estate at the time of his death, and whether any child or children of his own survived him, and who have not discharged their legal rights during his lifetime. It makes no difference whether the children be of his last or any former marriage.(*m*) The right extends to one-third of the moveable estate if there be a surviving child (whether such child succeeds to heritage or not), or children of the husband; and to one-half if there be no surviving child.(*n*) But under no circumstances is a widow entitled to more than one-half of the moveable estate.(*o*)

92. From what Property is *Jus Relictæ* Due.—*Jus relictæ* is due out of the whole moveable estate, including life policies,(*p*) of which the husband was possessed at the time of his death, under deduction of such debts, as, if due *to* him instead of by him, would have formed part of such estate.(*q*)

In questions between the widow and children, the following debts may be mentioned in illustration of those requiring to be deducted before a division be made: funeral expenses of the husband, including monument over his tomb; mournings for the widow; aliment to the widow till the next term after her husband's death; expenses of confirmation; provisions in marriage contract in favour of children; bonds of provision to children, if a rational provision, and this although the bonds be not delivered, if executed in *liege poustie*; provisions settled upon the wife by antenuptial contract of marriage, and even an increased provision to her under a will, if moderate and reasonable But no heritable debt can be deducted from the moveable estate in a question with the widow and children.(*r*)

Personal bonds not excluding executors and bearing interest are

(*i*) M'Laren, § 258; Bell's Prin. § 1591; Bell's Com. § 632; Ersk. 3, 9, 15.

(*k*) *Breadalbane's Trs.* 11th March, 1843, 15 Jur. 389.

(*l*) *Nisbet,* 24th Feb. 1835; 13 Sh. 517.

(*m*) Ersk. 3, 9, 17.

(*n*) Bell's Prin. § 1579.

(*o*) Ersk. 3, 9, 23. See also §§ 34, 58, 72.

(*p*) *Muirhead,* 6th Dec. 1867, 6 Macp. 95.

(*q*) Fraser 1, 536.

(*r*) Fraser 1, 536.

moveable,(*s*) as regards younger children, but they are heritable as regards the rights of husband and wife; consequently such bonds are not affected by the *jus mariti* or the *jus relictæ*.(*t*)

Heritable bonds now also form moveable property, except where conceived in favour of heirs excluding executors, but they are heritable in questions between the widow and children(*u*) and between the widower and children.(*v*)

This applies to bonds over heritable property in Scotland only; where the security subject is in England or abroad, the law of the place determines its character.(*w*)

It would seem that heritable bonds, like land and other heritable subjects, forming part of a company estate, are still moveable and subject to the legal claims of the widow, widower, and children, notwithstanding the recent alteration in the law as to heritable bonds.(*x*)

Where the estate is productively invested, interest is due on the *jus relictæ* from the date of the husband's death.(*y*)

93. When *Jus Relictæ* Vests.—The right vests in the widow by her survivance of the husband, without confirmation.(*z*) But she can enforce payment only through her husband's executor. As will be afterwards mentioned,(*a*) she may, in certain circumstances, herself be confirmed executrix *qua* relict, and thus ingather the whole estate and pay the debts, including her own *jus relictæ*.(*b*)

94. Right to *Jus Relictæ* Indefeasible.(*c*)—During the husband's life he may change his property from moveable to heritable, or he may alienate it, or gift it, or contract debts at his pleasure;(*d*) but he cannot defeat the *jus relictæ* by any fraudulent or other deed,(*e*) nor can he affect the right by any deed to take effect

(*s*) Act 1661, c. 32. Copied after 1641, c. 57.

(*t*) Ersk. 3, 9, 22.

(*u*) 31 & 32 Vict. c. 101, § 117; *Guthrie*, 23rd Oct. 1880, 8 R. 34.

(*v*) §§ 99, 113.

(*w*) *Monteith*, 28th June, 1882, 9 R. 982.

(*x*) *Minto*, 23rd May, 1833, 11 S. 632.

(*y*) *M'Intyre*, 9th July, 1865; 3 Macph. 1074. See *Connal*, 11th June, 1833, as to determining amount of *jus relictæ*, 11 S. 699.

(*z*) Ersk. 3, 9, 30.

(*a*) § 139.

(*b*) Ersk. 3, 9, 30.

(*c*) As the principles which govern *jus relictæ* are, barring the non-division of the right among several objects, almost identical with those which govern *legitim*, reference is made to §§ 100-10, relating to *legitim*. Reference is also made to the rules in the Institutional works quoted in §§ 34, 55, 56, 59, 62.

(*d*) M'Laren, § 260.

(*e*) *Keith's Trs.* 1857, 19 D. 1040.

after his death, without making a reasonable provision to his wife in lieu of it.(*f*) Deeds to be effectual in defeating the right must be irrevocable, be *inter vivos,* and be executed in *liege poustie.*(*g*)

The right will not be defeated by a deed directing money to be invested in land(*h*), and conversely the claim is not exigible out of the proceeds of lands sold by direction of the testator.(*i*)

95. How *Jus Relictæ* Discharged.—The exclusion of the *jus relictæ* may be effected in either of two ways, termed *discharge* and *satisfaction.* The claim is said to be discharged when it is renounced *inter vivos*—*e.g.,* in an antenuptial contract; and it is said to be satisfied when a reasonable testamentary provision is given by the husband in lieu of it.(*k*) The discharge may be either express or implied.(*l*) It is said to be express when granted in consideration of a provision in an antenuptial contract bearing to be in satisfaction of the *jus relictæ*(*m*); and it is said to be constructive or implied where a suitable provision is given to the wife without making use of the expression *jus relictæ*—*e.g.,* by the acceptance by her of a provision under a contract or settlement disposing of the totality of the moveable estate,(*n*) or where such a provision is given in words signifying a discharge of the right. But the acceptance of a provision, however large, does not bar the right to claim *jus relictæ* out of the husband's estate undisposed of(*o*); and this rule applies to provisions of every description.(*p*) A discharge of the right is implied when the wife is a party to a deed conferring on her a liferent of the husband's whole moveable estate(*q*); but not by the acceptance of a liferent of his heritage(*r*), nor of a liferent of a shop and household furniture, with an allowance for mournings(*s*); nor of the liferent of his dwelling-house, and an absolute right to the furniture therein(*t*); nor of a conventional provision by her in ignorance of her legal rights, or of her husband's true state of affairs.(*u*)

(*f*) Ersk. 3, 9, 16.
(*g*) Fraser, 1, 589.
(*h*) *Ramsay,* 11th July, 1833.
(*i*) *Bailie's Trustees,* 2d June, 1832.
(*k*) M'Laren, § 276.
(*l*) M'Laren, § 275.
(*m*) Ersk. 3, 9, 16; *Keith's Trs. supra.*
(*n*) *Caithness Trustees,* 20th June, 1877; Home, 1757, 5, Br. Sup. 330.
(*o*) *Keith's Trs.* supra.
(*p*) M'Laren, § 278.
(*q*) *Fisher's Trs.* 19th Nov. 1844, 7 D. 129.
(*r*) *Bell,* 14thMay, 1801.
(*s*) *Cross,* 16th Jan. 1801.
(*t*) *M'Fadyen,* 2nd Dec. 1882, 10 R. 285.
(*u*) *Llandell,* 2d March, 1854, 16 D. 714; *Logan,* 29th Oct. 1869.

96. How *Jus Relictæ* Satisfied.—The *jus relictæ* may be satisfied by the acceptance of an equivalent *mortis causa* provision in place of it, the renunciation of the right being a condition of the gift, as by a testamentary provision bearing expressly to be in lieu of the *jus relictæ ;* or by a provision given as part of a universal settlement,(*v*) but not by an annuity, unless it is declared to be in satisfaction of the *jus relictæ*(*w*). In the latter case the widow has the right to elect between the *jus relictæ* and the conventional provision.(*x*)

97. Effect of Discharge of *Jus Relictæ Inter Vivos*.—The right is extinguished leaving the whole free moveable succession to be divided between the children entitled to *legitim* and the husband's representatives.(*y*)

98. Effect of Provision in Satisfaction of *Jus relicta*.—The effect of a testamentary provision in satisfaction of the *jus relictæ* after the husband's death operates exclusively in favour of the fund burdened with the provision, usually the residue ; or, if that be undisposed of, of the husband's legal representatives.(*z*) It has no effect, therefore, upon the *legitim*,—as a general rule all beneficial interests lapsing by the operation of approbate and reprobate will either fall into residue, or result to the legal representatives.(*a*)

99. Right of Husband on Wife's Death. — Formerly the moveable estate of the wife, with trifling exceptions, fell to the husband on the celebration of the marriage in virtue of his *jus mariti* ; but by the Married Women's Property Act, 1881, the *jus mariti* is practically abolished, enabling the wife to hold her moveable estate, as regards at least the right to it, independently of her husband. And by § 6 of that Act it is provided that, from and after the passing of that Act, "the husband of any woman who may die domiciled in Scotland, shall take, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable

(*v*) *Stewart*, 29th Nov. 1832, 11 Sh. 139 ; *Keith's Trs. supra*. In Keith's case a distinction is drawn between a marriage-contract provision and testamentary provisions by the husband.

(*w*) *Howden*,18th May,1821,1 S. 18.

(*x*) *Baroness de Blonay*, 17th July, 1863, 1 Macp. 1147.

(*y*) M'Laren, § 281.

(*z*) *Campbell's Trs.* 15th July, 1862, 24 D. 1321.

(*a*) M'Laren, §§ 781, 942.

estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."(*b*)

100. *Legitim* out of Father's Estate.(*c*)—*Legitim* is a claim or debt,(*d*) accruing by law to the living children of a father dying domiciled in Scotland,(*e*) out of his free moveable estate,(*f*) wherever situated.(*g*) Where the father dies, leaving children but no widow, one-half is *legitim*, and where he dies leaving a widow and child or children, one-third is *legitim*, unless the widow, in any of the modes before mentioned, has renounced her *jus relictæ*, in which case the *legitim* will be one-half.

101. Father's Powers over *Legitim*.—The *legitim* cannot be defeated by the father under a will. He may, however, in his lifetime indirectly defeat it by alienating his moveables, or gratuitously giving these away, or converting them into heritable property. The deeds of alienation or of gift must, however, be absolute and irrevocable; be *inter vivos* and not *mortis causa*; and must not be granted with the intention of defeating the *legitim*.(*h*) The reservation of a liferent was found ineffectual to prevent the exclusion of *legitim* under a duly delivered and irrevocable *inter vivos* deed.(*i*) An absolute and irrevocable assignation of a farm lease and stocking duly intimated to the landlord and followed by possession was held sufficient to exclude *legitim*, although executed with the intention of preventing any claim to *legitim* on the part of some of his children.(*k*) But see case of *Buchanan*,(*l*) where a donation was held to be simulate, and not to effect the *legitim* fund.

102. When *Legitim* Vests.—At common law by the child's mere survivance of the father.(*m*) The right vests at the father's death, even where the widow has a liferent of the whole estate

(*b*) See § 90; also Notes on the Act in Appendix.

(*c*) M'Laren, § 244; Bell's Prin. § 1582; Ersk. 3, 9, 15. See also Note (*c*) to § 94.

(*d*) *Fisher*, 6th July, 1841, 3 D. 1181.

(*e*) *Lashley*, 12th July, 1804, 4 Pat. 581.

(*f*) *Breadalbane's Trs.* 11th March, 1843, 15 Jur. 389.

(*g*) Ersk. 3, 9, 15-21.

(*h*) Fraser, 1, 547.

(*i*) *Lashley, supra.*

(*k*) *Skinner*, 22nd Oct. 1872.

(*l*) 7th March, 1876, 3 R. 556.

(*m*) *Macdougal*, 20th Feb. 1858 20 D. 658.

under an antenuptial contract.(*n*) The claim is regulated by the law of the domicile at the dissolution of the marriage.(*o*) The children can only recover from the deceased's debtors through the medium of the executors.(*p*) They may recover *legitim* even after the lapse of twenty years from the date of vesting(*q*) with interest from that date.(*r*) A claimant of *legitim* may confirm as an executor-creditor.(*s*) Formerly a husband was entitled to claim his wife's *legitim* without her consent if she had no adverse interest; but see the effect of recent legislation in marriages contracted after 18th July, 1881,(*t*) vesting in the wife, exclusive of her husband's *jus mariti*, any moveable or personal property she may acquire before or during marriage.

103. To Whom Payable.—All the father's children alive at his death, of whatever marriage,(*u*) including posthumous children,(*v*) or, at least, to such of them as have not renounced or been forisfamiliated.(*w*) Illegitimate children are not entitled to *legitim*, as such children in the eye of the law have no father.(*x*) But children legitimated by the subsequent marriage of the parents are legitimate for all purposes.(*y*) The right does not transmit to grandchildren, as the law of representation in moveable property, which exists only by force of the statute of 1855, does not apply to *legitim;* but, once vested by survivance, the claims of children surviving the father pass to their representatives.(*z*) If there be only one child, *legitim* is due though such child succeeds to the heritage.(*a*) An eldest son succeeding to heritage takes no share of *legitim* if he succeeds to such heritage as heir-at-law of the intestate; but if he succeeds to heritage from a stranger and not *alioqui successuru*, he is entitled to a share of *legitim* with the rest.(*b*) The receipt of *legitim* by children does not deprive them of their share of what is called "the dead's part" in the capacity of next-of-kin.(*c*)

(*n*) *Fisher's Trustees*, 19th Nov. 1844, 7 D. 129.
(*o*) *Kennedy*, 2nd Feb. 1864.
(*p*) Bell's Lect. p. 1049.
(*q*) *Gourlay*, 23rd June, 1864; 2 Macph. 1284.
(*r*) *Sime*, 1st March, 1804.
(*s*) Ersk. 3, 9, 30.
(*t*) 44 & 45 Vict. c. 21.
(*u*) Henderson, 1634; Mor. 8164.
(*v*) Jervey, 1762; Mor. 8170.
(*w*) Bell's Prin. § 1583.
(*x*) Ersk. 1, 6, 51.
(*y*) Aikman, 3 Macq. App. 854.
(*z*) *M'Murray*, 17th July, 1852, 14 D. 1048.
(*a*) Howden, 1821, 1, Sh. 14.
(*b*) *Breadalbane*, 26th May, 1842, 4 D. 1259.
(*c*) Ersk. 3, 9, 17.

104. How Excluded or Diminished.(*d*)—*Legitim* cannot be excluded or diminished by any testamentary deed of the father, even where the child is a bankrupt,(*e*) a pupil or an idiot,(*f*) or where he misbehaves;(*g*) and it cannot be affected by any testamentary bequest, donation, or trust conveyance to another child, and still less to a stranger.(*h*) But the father may diminish *legitim* by *bona fide* alienations *inter vivos*,(*i*) by conversion of moveable estate into heritable,(*k*) or by lending upon heritable security.(*l*) The *legitim* was not excluded by a provision in an English marriage contract declared to be a daughter's "portion or fortune,"(*m*) and it is not diminished by loss incurred by the executor after realisation through the fault of those employed by him.(*n*)

105. From what Subjects *Legitim* Payable.(*o*)—Out of the whole free moveable estate possessed by the father at the time of his death, including succession to which he was entitled, assignable debts, &c.,(*p*) and also personal bonds, not excluding executors, which are moveable as regards *legitim* and "dead's part," although heritable after the term of payment as regards the *jus relictæ* and *jus mariti*,(*q*) also life policies, although effected on the life of the wife and not payable at the husband's death.(*r*) But see the effect of the Married Women's Policies of Assurance (Scotland) Act, 1880.(*s*)

106. Data for Determining Amount of *Legitim*.—The sworn valuation, made for the purpose of settling the inventory duty, is the proper datum for fixing the amount of the general succession, and the amount of the *legitim* (subject to division *per capita*) is determined by deducting from this aggregate fund all the debts for which the father's personal representatives are liable(*t*)—*e.g.* provisions to wife(*u*) and children(*v*)—under an antenuptial con-

(*d*) See note (*c*), § 94.
(*e*) Allan, 1762; Mor. 8208.
(*f*) *Morton*, 11th Feb. 1813 F. C.
(*g*) Anderson, 1799; Hume, 282.
(*h*) *Lashley, supra.*
(*i*) *Wilson's Trs.* 1856, 18 D. 1096.
(*k*) Ersk. 3, 9, 16; Bell's Prin. § 1584.
(*l*) *Pringle's Trs.* 15th March, 1872, 10 Macp. 621; see, also, Titles to Land Consolidation Act, 1868, § 117.
(*m*) *Breadalbane*, 30th Jan. 1836, 14 D. 309.
(*n*) *Dalhousie*, 26th March, 1868, 6 Macp. 659.
(*o*) See Note (*c*), § 94.
(*p*) *Breadalbane's Trs.* 26th May, 1842, 4 D. 1259; *M'Murray, supra.*
(*q*) 1661, c. 32.
(*r*) *Pringle's Trs. supra.*
(*s*) § 90, p. 97.
(*t*) M'Laren, §§ 247-48.
(*u*) *Johnstone*, 13th Jan. 1829, 7 Sh. 226.
(*v*) *Dickson*, 1678; M. 3944.

tract—unless given in satisfaction of the legal provisions, which would, in that case, be extinguished(*w*); postnuptial provisions to a wife, if reasonable and moderate(*x*); and bonds of provision to children, if delivered or payable before father's death(*y*); also, it would appear, if payable after death(*z*); funeral expenses, and mournings to widow(*a*); and aliment till the next term after the husband's death(*b*); expenses connected with the birth of a posthumous child(*c*); and the expenses incurred by the executors, including confirmation, inventory duty,(*d*) &c. On the other hand, testamentary legacies and such claims form burdens upon the dead's part only.(*e*).

107. How *Legitim* Discharged.—By the express declaration of parents in their antenuptial contract; or an individual member of a family may discharge by his own deed(*f*); and this generally takes place in practice on the occasion of his or her marriage. A discharge of *legitim*, in order to be effectual, must be so conceived as to bar the claim.(*g*) It is not to be implied unless made in express terms(*h*); thus the receipt by a daughter on her marriage in English marriage articles for a sum from her father as "her portion or fortune," was held not to discharge the *legitim*(*i*), nor an acknowledgment by a daughter of sums conveyed to her on her marriage in part of her patrimony.(*k*) But *legitim* is constructively discharged where, in an antenuptial contract, the whole of the parents' moveable estate is settled upon the children of the marriage, or subject to a power of division, express or implied(*l*); or upon the wife in liferent and the children of the marriage in fee(*m*); or even upon the wife in fee simple.(*n*)

108. How *Legitim* Satisfied.—By acceptance of a testamentary provision declared to be in lieu of *legitim;* or by acceptance

(*w*) Keith, 19 D. 1057.
(*x*) Ersk. 3, 9, 16.
(*y*) Ersk. 3, 9, 22.
(*z*) M'Laren, § 248.
(*a*) Ersk. 3, 9, 22. *Rennie,* 16th May, 1800; *Shedden,* 15th May, 1802.
(*b*) *M'Intyre,* 9th July, 1865; 3 Macph. 1074.
(*c*) Ersk. 1, 6, 41.
(*d*) *Breadalbane, supra.*
(*e*) Ersk. 3, 9, 16. See also on this subject, § 61.
(*f*) Bell's Prin. § 1587; *Maitland,* 14th Dec. 1843, 6 D. 244.
(*g*) *Hog,* 16th July, 1804, 12 F. C. 394.
(*h*) Stair, 3, 8, 45.
(*i*) *Breadalbane,* 30th Jan. 1836, 14 Sh. 309.
(*k*) *Clarke,* 27th Jan. 1835, 13 Sh. 326.
(*l*) Home, 1757; 5 Br. Sup. 330.
(*m*) *Fisher's Trs.* 19th Nov. 1844, 7 D. 129.
(*n*) M'Laren, § 267.

of a provision in a general settlement disposing of the whole moveable estate;(*o*) or the right may be extinguished where the claimant is heir-at-law to his father and succeeds to the heritable estate;(*p*) or the right may be satisfied or compensated by advances to a child by the father during his lifetime on account of *legitim.* The children can elect between the legal claim of *legitim* and the conventional provision.(*q*)

109. Effect of Discharge of *Legitim* during Father's Life.—If by all the children, such a discharge leaves the moveable estate on the father's death to be equally divided between the wife and his representatives; or, if the wife be already dead or have accepted a conventional provision in lieu of her *jus relictæ*, it converts the whole free moveable estate into dead's part(*r*). But where only one or some of the children have discharged (whether by antenuptial contract or by the acceptance of a provision *inter vivos*), this has not the effect of increasing the dead's part, but of increasing the fund for division amongst the remaining children entitled to *legitim.*(*s*) Where a child has expressly discharged his claim of *legitim* during his father's life, he is said to be foris-familiated.(*t*)

110. Effect of Discharge of *Legitim* after Father's Death.—Whether by one or all of the children, operates as an assignation or discharge of the share or shares of *legitim* to the person entitled to the residuary right of succession.(*u*)

111. Advances by Father to Children.(*v*)—*Application of the doctrine of* collatio bonorum inter liberos.—This doctrine only arises between children who have claimed *legitim*, and it can have no place when *legitim* is renounced. The principle on which the rule of law rests was stated by the Lord Justice-Clerk in a recent case thus(*w*): "If a father during his lifetime make advances to one of his children on the ordinary footing of debtor and creditor, such advances must be repaid as ordinary debts whether *legitim* be claimed or no. But if the advance is made without any right reserved by the father to demand, or obligation on the recipient to

(*o*) *Wilson's Trs.* 1st July, 1843, 15 Jur. 549.

(*p*) *Anstruther*, 20th Jan. 1836, 14 Sh. 272; *Fisher's Trs.* 5th Dec. 1850, 13 D. 245.

(*q*) M'Laren, § 263.

(*r*) Ersk. 3, 9, 23.

(*s*) *Hog*, 7th June, 1791, M. 8193; *Panmure*, 28th Feb. 1856, 18 D. 703.

(*t*) See § 62.

(*u*) *Fisher*, 6th April, 1843, 3 D. 1181.

(*v*) For rules in Mackenzie's Inst. see § 36; in Erskine's, §§ 63, 64. See also rules in English Law, § 218.

(*w*) *Monteith*, 28th June, 1882, 9 R. 982.

repay the amount, such sums form no part of the father's moveable succession. He has parted with the money for good, and excepting in one event, the other children have no concern with it. If the recipient claim a share of *legitim*, then arises the equitable obligation which the term collation imports, that the sums received by the claimant during the father's lifetime shall be taken into computation—that is, collated. But if the child renounce his right to claim *legitim*, the other children have no interest in these advances." In the same case it was held that tocher given to daughters in their marriage-contracts was not to be reckoned in ascertaining the amount of the fund from which *legitim* was payable, chiefly on the ground that the doctrine of *collatio bonorum inter liberos* applies only when more than one child claims *legitim*. All sums advanced by the father out of the fund from which *legitim* comes to any child, or for his or her behoof, must be collated and imputed as part of the *legitim*(*x*), though no written acknowledgment has been given(*y*); unless such sums shall appear to have been intended by the father as a *præcipuum*(*z*); such cases yield to proof.(*a*) Advances for the purchase of a commission in the army,(*b*) or advances for which no obligation for debt is taken,(*c*) or advances entered in the father's books as gifts,(*d*) or advances for setting a child up in trade, or for a settlement in life, or for a marriage portion, must be imputed to *legitim*,(*e*) and accounted for with interest by the child from the day he received the advance;(*f*) and so, also, it would appear, must unpaid provisions constituted by antenuptial contract, and not declared to be in satisfaction of *legitim*.(*g*) But neither aliment, nor the expense of education, nor inconsiderable presents, nor remuneration for services performed or yet to be executed,(*h*) nor, generally, money received in loan requires to be collated.(*i*) The right to require collation of advances pertains exclusively to the claimants of *legitim*;(*k*) and such claimants are not bound to collate with the widow.(*l*)

(*x*) *Keith's Trs.* 29 Jur. 497.
(*y*) Ersk. 3, 9, 24.
(*z*) Bell's Prin. § 1589.
(*a*) M'Laren, § 322; Welsh, 19th January, 1878, 15 S.L.R. 291.
(*b*) *Nisbet*, 10th March, 1868, 6 Macp. 567.
(*c*) *Trevelyan*, 11th March 1873, 11 Macp. 516.
(*d*) *Douglas*, 8th Nov. 1876, 4 R. 105
(*e*) Bell's Prin. § 1588.
(*f*) *Johnston*, 13th January, 1829, M. 8172.
(*g*) Fraser, 1, 572.
(*h*) Stair, 3, 8, 26.
(*i*) M'Laren, § 324.
(*k*) *Keith's Trs.* 17th July, 1857, 19 D. 1041.
(*l*) *Ross*, 1627, M. 2366 See §§ 63, 64; also rules in English Law, § 218.

112. Power of Election between *Legitim* and Conventional Provisions.—By the doctrine of approbate and reprobate,(*m*) children have the option of either accepting conventional provisions, or rejecting them and claiming their *legitim*.(*n*) An election made in ignorance of the party's legal rights, or in circumstances not admitting of deliberation, may be recalled.(*o*) An election made by a minor is reducible on the ground of minority and lesion.(*p*) A husband is not entitled to elect for his wife,(*q*) nor can creditors control the wife's right of election unless she renounce a larger interest which would have gone to them for a smaller interest secured to herself.(*r*) The rights of grandchildren under a settlement will not be prejudiced by the children's repudiation of it—thus, where A provides a liferent interest of a subject to B, his son, and the fee to C and D, his grandchildren, the rejection of the liferent provision by B does not affect C and D's right to the fee.(*s*) So where a father was given the liferent of a fund of which his children were fiars, and he claimed *legitim* instead, it was held that the income of the fund during the father's life was payable to those whose interests were prejudiced by the payment of the *legitim*, but that the capital was a separate estate in the children which was not affected by their father's repudiation of the settlement(*t*). It is not necessary that the gift to the children be separate in form in such a case; if it is substantially a separate and independent interest, the law will protect it, and will not involve the children in the consequences of the parent's election to claim *legitim*(*u*).

113. *Legitim* out of Mother's Estate.—Formerly no *legitim* was payable out of the mother's estate, but by the Married Women's Property Act, 1881, from and after the passing of that Act "the children of any woman who may die domiciled in Scotland shall have the same right of *legitim* in regard to her moveable estate, which they have according to the law and practice of

(*m*) Bell's Prin. § 1938; Ersk. 3, 3, 49; Macfarlane, 20th July, 1882, 19 S. L. R. 850.

(*n*) *Jack*, 21st January, 1879, 16 S. L. R. 326.

(*o*) M'Laren, § 926.

(*p*) *Telford*, 12th May, 1835, 13 Sh. 735.

(*q*) *Buckingham*, 15th Dec. 1843, 6 D. 250.

(*r*) *Lowson*, 15th July, 1854, 16 D. 1098.

(*s*) *Fisher*, 1st July, 1833, 6 W. & S. 431, & 10 Sh. 55.

(*t*) *Jack's Trustees*, 21st Jan. 1879, *supra*; *Fisher* v. *Dixon*, 6 W. and S. 431.

(*u*) *Snody's Trustees*, 9th Feb. 1883, 20 S. L. R. 392.

Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be."

114. Dead's Part (*v*)—Is that portion of a person's free moveable estate which he or she can validly dispose of by settlement, and which, failing disposal, falls to children or other personal representatives. The amount of the dead's part varies according to circumstances.

I. *In the Case of a Man Dying.*

(1.) Survived by wife and child or children, one-third(*w*)
(2.) Survived by wife without child or children, one-half(*x*)
(3.) Survived by child or children without wife, one-half(*y*)
(4.) Unmarried ... ... the whole(*z*)

} is dead's part.

Special provisions in a contract of marriage may, however, increase or diminish the dead's part; or the same consequence may result from renunciations or discharges of their legal rights by the wife or children.(*a*) Where valid renunciations or discharges of their legal rights have been granted by

(1.) Wife and children ... ... the whole(*b*)
(2.) Wife but not the children ... ... one half(*c*)
(3.) Children but not the wife ... ... one half(*d*)

} is dead's part.

As before observed,(*e*) where the renunciation, forisfamiliation, or discharge during the father's life is by some of the children only, the *legitim* thereby set free accrues to the other children, and even to the heir if he be the only other child, and does not fall into the dead's part.

II. *In the Case of a Woman Dying.*

1. *Previous to* 18*th July,* 1881.

(1.) Survived by husband, whether by children or not
(2.) Unmarried or predeceased by husband

} the whole { is dead's part, and in the first case goes to the husband,(*f*) excepting the paraphernalia, which went to the wife's children or next-of-kin.(*g*)

(*v*) Ersk. 3, 9, 18; Bell's Prin. § 1592. For rules in Mackenzie's Inst. see § 35; in Erskine's, § 57.
(*w*) Bell's Prin. § 1579.
(*x*) *Ibid.*
(*y*) M'Laren, § 221.
(*z*) Bell's Prin. § 1861.
(*a*) §§ 95, 96, 104, 107, 108.
(*b*) Bell's Prin. § 1581.
(*c*) §§ 95-98.
(*d*) Bell's Prin. § 1590.
(*e*) § 109, 110.
(*f*) 18 Vict. c. 23, § 6.
(*g*) Bell's Prin. § 1861.

It is, however, under the law prior to 18th July, 1881, hardly correct to speak of a husband succeeding to the moveable property of his wife on her death. Rather was it that the moveable property of the wife was vested in and belonged to the husband *jure mariti* as his own property, and at the death of his wife neither her children nor her relatives had any claim thereto. Upon the death of a wife, survived by her husband, her next-of-kin, by the Intestate Moveable Succession Act of 1855(*h*), had no right to any share of the goods in communion. This, however, did not deprive her children, or her nearest heirs, of her paraphernalia, consisting of her dress, ornaments, and jewellery peculiar to a wife's person, and chest of drawers appropriated to a wife's clothes; which paraphernalia, on a wife's death, descended to her children or nearest heirs and did not fall under the *jus mariti* of the husband(*i*).

2. *Subsequent to* 18*th July,* 1881.

Since the passing of the Married Women's Property (Scotland) Act, 1881 "the husband of any woman who may die domiciled in Scotland shall take, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be." Likewise the children of any such woman shall have the same right to *legitim* out of the moveable estate of their deceased mother as they have out of the moveable estate of their deceased father. Consequently, where the *jus mariti* is excluded, the dead's part in the case of a woman's intestacy is now the same as that of a man's intestacy.

115. Who Succeeds to Dead's Part.—As a general rule the dead's part passes to the next-of-kin of the intestate, but the heir in heritage is not entitled to a share unless he collate.(*k*) The doctrine of collation being afterwards explained,(*l*) it is sufficient here only to remark that the heir in heritage is not entitled to a share of the dead's part unless he collate, or unless he succeeds *ab intestato*, or is the only child of the deceased.

Where the wife and children, or the children merely, have

(*h*) § 6.
(*i*) See § 119.
(*k*) Ersk. 3, 9, 19, and 3, 9, 3.
(*l*) § 120.

renounced their legal provisions, they are still entitled to their share of the dead's part; but the widow takes no share of the dead's part(*m*), nor do the wife's children of a former marriage take any share of the husband's estate.(*n*)

116. Vesting of Dead's Part.—Formerly confirmation was necessary to vest the dead's part in the next-of-kin; but now, if children survive their parent and die without confirming as executors, their right has vested, and will transmit to their executors.(*o*)

117. Peculium is a fund excepted from the communion of goods, and consists of money or articles secured or gifted to the wife, and which thereafter remain her exclusive property.(*p*) The fund may be secured in either of the ways stated under *jus mariti*.(*q*) But in marriages contracted after 18th July, 1881, and where the husband had at the time of the marriage his domicile in Scotland, the distinction of *peculium* would seem to lose its importance, as the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*.

118. Forisfamiliation takes place when a child has received something in satisfaction of the *legitim*, and discharged the *legitim*.(*r*)

119. Paraphernalia.—This is the term applied in the law of Scotland to the wife's dress and the ornaments proper to her person.(*s*) Such articles, where in keeping with the status of the wife, the law regards as peculiarly her property, to be descendible to her own heirs, and not to be attachable by the creditors of the husband. A chest of drawers or wardrobe appropriated to a wife's clothes was held to be paraphernal,(*t*) but not articles of household furniture, such as bedstead and bedding, table-linen, mirror, lady's work-table, dressing plate, tea-plate, &c.(*u*) Although paraphernalia were the property of the wife, they were not at her disposal *inter vivos* without her husband's

(*m*) Ersk. 3, 9, 23.
(*n*) Bell's Prin. § 1579.
(*o*) 4 Geo. IV. c. 98, § 1.
(*p*) Bell's Prin, § 1560.
(*q*) See § 90.
(*r*) Bell's Prin. §§ 1583, 1587.
(*s*) Bell's Prin. § 1555.
(*t*) *Cameron*, 5th Feb. 1876. See § 90 for definition of paraphernalia given by Lord Deas.
(*u*) Bell's Prin. § 1557. *Black*, 24th November, 1803.

consent, but she might bequeath them by will. Under the Married Women's Property (Scotland) Act, 1881, it may be doubted how far the distinction of paraphernalia now holds in marriages contracted after the passing of that Act, and where the husband had at the time of the marriage his domicile in Scotland, seeing that the whole moveable or personal estate of the wife, whether acquired before or during the marriage, is now vested in the wife as her separate estate, exclusive of the husband's *jus mariti*. But assuming that Act not to do away with the distinction of paraphernalia, it would seem that a married woman cannot *inter vivos* sell, dispose of, or pawn her paraphernalia without her husband's consent, the law apparently presuming that the husband has an interest in seeing his wife well-dressed and her jewellery protected. A question may arise under the Married Women's Property (Scotland) Act, 1881, in determining the amount payable to a husband as the equivalent of the *jus relictæ* out of the moveable estate of his deceased wife whether paraphernalia is to be excluded from the moveable estate; but it would rather seem that as no distinction holds in the case of the husband's jewels, no such distinction would hold in the case of the wife's jewels; and paraphernalia in a question with the husband at his wife's death, would fall to be treated as part of her moveable estate.

120. Collation between Heirs and Personal Representatives.(*v*)—Where the property of an intestate dying domiciled in Scotland consists partly of heritage and partly of moveables, the heir in heritage, provided he succeeds by disposition of the law, has no share of the moveable estate if there be another or others as near in degree to the deceased as himself, unless he chose to collate—*i.e.*, throw the heritage, or, in the case of an heir of entail, the value of his life interest in the estate, into the common stock or executry, and take an equal share of the aggregate with the legal representatives. This is a privilege which the heir can exercise when he finds it to be for his interest, but in a question with creditors he may be compelled by them to collate when his doing so would increase the value of his interest in the succession.(*w*) The doctrine of collation applies to collaterals as well as to descendants.(*x*)

(*v*) Ersk. 3, 9, 3; M'Laren, § 292; 1 Bell's Com. 5th Ed. 100; Prin. § 1910. For rules in Mackenzie's Inst. see § 36; in Erskine's, § 54.

(*w*) 1 Bell's Com. 5th Ed. 104.

(*x*) Ersk. 3, 9, 3.

121. Subjects of Collation are, on the one hand, the whole of the free heritable succession,(*y*) including leases, even though they exclude assignees,(*z*) and also heritage situated in any other country to which the heir so claiming succeeded as heir under the law of such country(*a*); and, on the other, the whole of the free moveable succession upon which the heir has a claim—*i.e.*, dead's part or *legitim*, or both, as the case may be.(*b*)

122. Mode of Collating Heritage.—By the heir and personal representatives completing their respective titles, and dividing the aggregate heritable and moveable succession,(*c*) the data of value being taken as at the date of the opening of the succession.(*d*) The heir may, in his option, retain the heritage if he communicates to the personal representatives the value of it, or of his interest in it after deducting any debts and provisions affecting it.(*e*) The fact of the collation will not alter the character of the property from heritable to moveable, except where it is sold.(*f*) Where the heritable estate is heavily burdened, and the heir conveys in *forma specifica*, the debts and provisions which affect it will form a burden upon the common fund.(*g*)

123. What Heirs Entitled to Collate.—The right belongs only to the heir of line or the heir-at-law.(*h*) Formerly, the heir-at-law was not entitled to collate unless he was next-of-kin(*i*); but now, by the Moveable Succession Act, where B, a person predeceasing his ancestor A, would have been heir, B's child being B's own heir-at-law is entitled to collate, and if B's child refuses to collate, the brothers and sisters of B's child and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation.(*k*) Heirs-portioners succeed equally to the heritable as well as the moveable estates, and this is practically collation, although the division is not generally assigned to the operation of that doctrine, but to the law of equal distribution in

(*y*) *Pollock*, 1667, M. 5402.
(*z*) *Fisher*, 5th Dec. 1850, 13 D. 245.
(*a*) *Dundas*, 14th Jan. 1829; 1 Jur. 7, M'Laren, § 295.
(*b*) M'Laren, § 296.
(*c*) Bell's Prin. § 1913.
(*d*) *Fisher's Trs.* supra.
(*e*) *Fisher's Trs.* supra
(*f*) *Hodge*, 22nd Nov. 1879, 7 R. 259.
(*g*) M'Laren, §§ 309-14.
(*h*) Bell's Prin. § 1911.
(*i*) Ersk. 3, 8, 77.
(*k*) 18 Vict. c. 23, § 2.

the female line.(*l*) But when the heirs-portioners are not the sole next-of-kin, the doctrine applies.(*m*) An heir *alioqui successurus* is not entitled without collating to a share of the moveables—

(1.) Though the heritage should be given to him as a gift by way of testamentary settlement, or by deed *inter vivos*.(*n*)

(2.) Though the heritage be situated abroad.(*o*)

(3.) Though he should succeed under a deed of entail(*p*); and in the case of female heir of entail she must collate with those who are next-of-kin but not heirs-portioners(*q*): all that an heir of entail is bound to communicate are the rents falling to himself, or the value of his life interest.(*r*)

But an heir who is one of the next-of-kin, or a child of one of the next-of-kin, in order to enable him to claim a share of the moveables, is not obliged to collate heritage which is not his *by disposition of the law*.(*s*) Hence he is not bound to collate—

(1.) Where he takes heritage from a stranger.(*t*)

(2.) Where he takes as heir of provision, not being heir *alioqui successurus—e.g.*, a younger son is not bound to collate his provision with the dead's part or *legitim*.(*u*)

(3.) Heritable and moveable successions derived from different sources—*e.g.*, where the last heir died in apparency and the title of the heir-at-law was made up by service to a remoter ancestor.(*v*)

(4.) Where he is heir of entail and not heir *alioqui successurus*.(*w*)

(5.) An heir-at-law who is also sole next-of-kin is not bound to collate with the widow.(*x*) There is also no obligation to collate heritage coming from the mother in order to entitle her heir to participate in the moveable estate of the father, nor *vice versa*.(*y*)

124. Division of Rents, &c., between Heir and Executor.—The law on this subject was altered in the year 1870; but, as

(*l*) *Rickart*, 1720, M. 2378.
(*m*) *Balfour*, 1793, 3 Pat. 300.
(*n*) *Fisher*, 19th Nov. 1844, 7 D. 129.
(*o*) *Dundas*, supra.
(*p*) *Breadalbane*, 16th Aug. 1836, 2 S; and M'Laren, 377.
(*q*) M'Laren, § 302.
(*r*) M'Laren, § 300.
(*s*) Bell's Prin. § 1912.
(*t*) *Spalding*, 11th Dec. 1812; Hume, 119.
(*u*) *Buccleuch*, 1677, M. 2369.
(*v*) *Russell*, 7th June, 1822, 1 Sh. N. E. 435. Estates now vest in heir by survivance, see § 267.
(*w*) *Rae Crawford*, 3rd Dec. 1794, M. 2384.
(*x*) *Trotter*, 1681, M. 2375.
(*y*) Bell's Lect. p. 799.

questions may yet arise under the old law, we shall here give a summary of the old as well as of the new law.

I. *The Law prior to 1st August*, 1870.

A certain proportion of rents current at the date of death and other termly payments formed moveable property. In determining the proportion held moveable, a distinction was taken between—1. the rights of the personal representatives of the proprietor of a fee-simple estate in competition with the heir-at-law or heritable disponee; and 2. the rights of the personal representatives of a person whose interest was determined by his death (as a liferenter, heir of entail, or annuitant), in competition with the person succeeding to the reversion, whether of heritable or personal property.

In the first case, the rights of the parties were regulated by the common law; in the second, by the Apportionment Act(*z*) where the payments were made at *termly* periods, and by the common law where not so made.

1. *In Questions with the Personal Representatives of Fee-Simple Proprietors.*—Fruits and current rents and interests were moveable and payable to the personal representatives only in so far as vested and unpaid at the proprietor's death.(*a*) The date of vesting, therefore, regulated the division, and in determining the time at which the vesting took place, the following distinctions were observed:—

(1) *Arable Farms.*—The rents were held by law to vest in the proprietor at the first term of Whitsunday (15th May), or Martinmas (11th Nov.), after the date of the tenant's entry.(*b*) These terms of payment were called *legal*, in contradistinction to any terms agreed upon by the contracting parties, called *conventional*. Rents conventionally postponed were held to be *in bonis* of the proprietor at the legal terms, and to transmit to his personal representatives, although, in such cases, payment could not be demanded from the tenant until the arrival of the terms stipulated.(*c*) Rents payable by anticipation or forehand rents vested at the term of payment, and arrears of such rents, if payable in the proprietor's lifetime, fell to his personal representatives.(*d*)

(*z*) 4 Will IV. c. 22.
(*a*) M'Laren, § 392.
(*b*) Bell's Com. i. 18.
(*c*) *Trotter*, 26th Nov. 1839, 2 D. 140.
(*d*) *Queensberry*, 18th Feb. 1814.

(2) *Grass Farms.*—The first half-year's rent legally vested the moment possession began, and so with regard to subsequent rents.(*e*) Hence, where the proprietor survived Martinmas (entry being at the preceding Whitsunday), the whole year's rent went to his personal representatives, while, if he died before Martinmas, his personal representatives received only the half. Where grass farms were let from April to December, and the proprietor survived Whitsunday, but died before Martinmas, one-half of the year's rent went to his personal representatives.(*f*)

(3) *House Rents* were regulated by the same rules as the rents of grass farms.(*g*)

(4) *Heritable Bonds.*—Interests accruing at the legal terms were as rents due at these terms, the arrears only being moveable in cases where such bonds were considered heritable in succession. If conventional terms were stipulated the question was ruled as stated above with regard to conventional payments of rents.

(5) *Subjects in Natural Possession of Proprietor.*—The usufructory interest vested *de die in diem.*(*h*) Hence, whatever had been sown and unreaped by the proprietor formed part of the executry estate, and where the ground had been prepared, but not sown, the expense of labour fell to be borne by the heir. But natural grass(*i*) and second crop of hay went to the heir.(*k*)

In the case of a tenant, the rights of his heir and personal representatives were regulated by the same rules; but the latter paid a proportion of the rent corresponding to the part of the farm under crop.(*l*)

2. *In Questions with the Personal Representatives of Persons whose interests were Determined by Death.*—The profits of the current period of possession, if derived from termly payments, were divisible under the provisions of the Apportionment Act.(*m*) This Act is very verbose, but the gist of it is this, that all rents, annuities, dividends, and other periodical payments due at fixed

(*e*) *Campbell*, 18th July, 1849, 11 D. 1426.

(*f*) *Swinton*, 20th June, 1809.

(*g*) *King*, 24th Jan. 1828.

(*h*) Ersk. 2, 9, 66; Bell's Prin. § 1498.

(*i*) Ersk. 2, 9, 65.

(*k*) *Keith*, 3rd Dec. 1825, 4 Sh. 267; *Gordon*, 1806, Hume, 188.

(*l*) Bell's Dictionary *voce* "Heir and executor."

(*m*) 4 & 5 Will. IV. c. 22; *Bannatyne's Trs.* 12th Jan. 1872, 10 Macp. 319.

periods under any instrument made or taking effect after the passing of the Act should be so apportioned as, on the death of those entitled to them, to yield to their executors a proportion corresponding to the period that might have elapsed since the last term of payment. The Act, therefore, applied only to cases in which the interest of the person interested in rents and periodical payments was terminated by his death, or by the death of another person. It did not apply to dividends declared by joint stock companies subject to the Companies Clauses Consolidation Act, as not being due at fixed periods, nor to royalties payable on minerals at so much per ton, nor to any payments to be made at uncertain periods.

II. *The Law since 1st August,* 1870.

At this date the Act 33 & 34 Vict. c. 35 was passed, which introduced a very simple rule on this subject.

(1.) *Rents and periodical payments accrue from day to day.*—All rents, rent service, rent-charge, rent seck, tithes, and all periodical payments or renderings in lieu of, or in the nature of rent or tithe; annuities, salaries, and pensions; dividends, including all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, whether divisible at fixed times or otherwise, and other periodical payments in the nature of income, are now, like interest on money lent, considered as accruing from day to day, and apportionable in respect of time accordingly. The Act has no application to the stipend of a parish minister.(*n*)

(2.) *Apportioned part payable when next entire portion becomes due.*—The apportioned part of any rent, annuity, dividend, or other payment is payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.

(3.) *Rents, &c., when due, recovered by heir, &c.; from whom apportioned part recovered by executors, &c.*—"All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons

(*n*) *Latta,* 30th Nov. 1877, 5 R. 266.

whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively; provided that persons liable to pay rents reserved out of, or charged on lands or other hereditaments of any tenure, and the same lands, or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid, specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person, who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same, by action at law or suit in equity." See question as to "just allowances" under this section in special case *Learmonth and Sinclair's Trs.* 23rd Jan. 1878.

(4.) *Exemptions from operation of Apportionment Act.*—Nothing in the Act 33 & 34 Vict. c. 35 shall render apportionable any annual sums made payable in policies of assurance of any description; nor shall the provisions of the Act extend to any case in which it is, or shall be expressly stipulated, that no apportionment shall take place.

125. Representation or Division, per Capita and Per Stirpes.(*o*)—*Per capita* means by heads, or that the parties shall share equally; and *per stirpes* means by families, or that the children of each child deceased shall collectively take the share of such child by representation.

In every case of succession in moveable estate, where the next-of-kin—other than in the case of the succession of children of the intestate, whose claim of *legitim* would alter the result of the division—are all equal in degree, whether nearer or more remote; the free succession,—*i.e.*, the whole moveable estate after payment of debts, including the *jus relictæ* and *legitim*,—if any, is divisible *per capita*, without distinction of age or sex, without any preference of males over females, and without any advantage

(*o*) See rules in English law, § 216.

accruing to the elder over the younger.(*p*) So if, at the time of the intestate's death, none of his children are dead, or if some have died and left no issue, the surviving children take *per capita*. Again, if, for instance, the intestate had three children, A, B, and C, and they all predeceased him—A leaving two children, B three children, and C four children—these children, being all in the same degree of relationship to the intestate, would take *per capita*, or each one-ninth part of his estate. The same rule applies to great-grandchildren, where children and grandchildren have all predeceased the intestate. But where some only of the next-of-kin have predeceased their parent, leaving issue, such issue represent their own parent, and take his or her share.(*q*) Thus, if the intestate had three brothers, A, B, and C, of whom A had died before the intestate, leaving issue, the estate would be divided into three equal parts, of which B and C would take one part each,—*i.e.*, *per capita*,—and the remaining third part would be divided equally among the children of A, who would take their share *per stirpes*—*i.e.*, as representatives standing in his place. But this principle of representation is not admitted beyond the descendants of the intestate and of his collaterals—*i.e.*, it is admitted among lineal descendants of the intestate, and among his brothers and sisters (including consanguinean and uterine),(*r*) and their descendants. The succession by brothers and sisters is partly affected by the survivance of the intestate's father and mother,—the intestate's father receiving one-half of the moveable estate,(*s*) and the intestate's mother (where the father has predeceased the intestate), receiving one-third of the moveable estate,(*t*) in preference to the intestate's brothers and sisters or other descendants. The succession of brothers- and sisters-uterine, and of their descendants in their predeceasing parent's place, is limited to one-half of the moveable estate of the intestate, and emerges only where the intestate leaves no issue, nor father, nor mother, nor any brothers, or sisters-german or consanguinean, nor any descendant of such brothers or sisters.(*u*) Where a person directed his estate to be divided "between my surviving brothers and sisters and the lawful issue of those who may be deceased, share and share alike," it was held that the division must be *per stirpes*.(*v*)

(*p*) Bell's Prin. § 1861; Ersk. 3, 9, 2; *Turner*, 27th Nov. 1869, 8 Macp. 222.
(*q*) 18 Vict. c. 23, § 1.
(*r*) 18 Vict. c. 23, § 5.
(*s*) 18 Vict. c. 23, § 3.
(*t*) 18 Vict. c. 23, § 4.
(*u*) 18 Vict. c. 23, § 5.
(*v*) *Laing*, 18th Nov. 1879, 7 R. 244.

126. Bastardy, or Children Born out of Wedlock.(*w*)—Illegitimate children do not succeed at common law even to their own father and mother, because succession is through the father only, and an illegitimate child has no lawful father.(*x*) But now under the Married Women's Property Act of 1881,(*y*) such children may be held as having a right to succeed to their own mother.

The law of the domicile of the father at the time of his marriage determines the legitimacy of all persons claiming right to a succession, whether real or personal, testate(*z*) or intestate.(*a*) A child legitimated in Scotland by the subsequent marriage of its parents is legitimated in that country for all purposes, and stands on an equality with children born in wedlock; but such a child will not succeed to any heritable or real estate forming part of the succession of a domiciled Scotsman which may be situated in countries—*e.g.*, in England — where the law of legitimation *per subsequens matrimonium* does not obtain; the succession to such heritable or real estate being governed by the *lex loci*.(*b*) Where, again, a child is born in a country where his parents are domiciled, and where the law of legitimation by subsequent marriage is unknown, such child is deemed illegitimate in Scotland.(*c*)

There is no succession from an illegitimate person, except in the case of his leaving lawful issue. If he leave neither wife (who would be entitled to her legal rights), nor children, his moveable estate on his death, failing disposition by will, will fall to the Crown.(*d*) But by royal letters of legitimation those who would have succeeded if the intestate had been legitimate, may acquire a right to his succession as if lawful heirs.(*e*) At common law, bastards could not make a will to the prejudice of the Crown; but this disability was removed by the 6 & 7 Will. IV. c. 22, which enacts that it shall "be lawful to bastards or natural children domiciled in Scotland to dispose of their moveable estates by testament or last will, in like manner as other persons belonging to that country may do."

(*w*) See §§ 65, 66, for rules in Erskine's Inst.

(*x*) Ersk. 3, 10, 5, & 1, 6, 51; Bell's Prin. § 2063.

(*y*) § 7.

(*z*) *Munro*, 10th Aug. 1840; 1 Rob. 492; Udny, 3rd June, 1869, 7 M. (H. L.) 89.

(*a*) *Dalhousie*, 16 Sh. 6, 10th Aug. 1840; 1 Rob. 475.

(*b*) M'Laren, § 39; Paterson's Comp. § 841.

(*c*) *Aikman*, 21 D. 757, 12th March, 1861; 3 Macq. 854.

(*d*) Bell's Prin. § 2063.

(*e*) Bell's Prin. § 2064.

127. Aliens are persons born beyond the dominions of the British Crown, of parents who are not themselves natural born subjects.(*f*) Children of British parents,(*g*) or of a father,(*h*) or of a mother(*i*) who is a natural born subject, though born out of the allegiance of the Crown, have all the rights of natural born subjects, so also has any woman married to a natural born subject or person naturalised.(*k*) Formerly the rights of aliens were regulated by the above Act, under which, generally speaking, aliens might obtain privileges nearly equal to natural born subjects, by obtaining a certificate of naturalisation from the Secretary of State. But now by the Act 33 & 34 Vict. c. 14, aliens are enabled to acquire, hold, dispose of and transmit heritable and moveable property situated within the United Kingdom, in the same way and with the same rights of succession as natural born subjects. The Act does not, however, qualify aliens to hold public offices, or to exercise any franchise, nor to be owners of a British ship(*l*); neither does it confer any right or privilege as a British subject except as above stated. The Act is not retrospective.(*m*) The following are the provisions of the Act as regards the natural status of women and children(*n*):—

(1.) A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.

(2.) A widow, being a natural born British subject, who has become an alien by, or in consequence of, her marriage, shall be deemed to be a statutory alien, and may as such at any time during widowhood obtain a certificate of re-admission to British nationality, in manner provided by the Act.

(3.) Where the father, being a British subject, or the mother, being a British subject and a widow, becomes an alien in pursuance of the Act, every child of such father or mother who, during infancy, has become resident in the country where the father or mother is naturalised, and has according to the laws of such country become naturalised therein, shall be deemed to be the subject of the State of which the father or mother has become a subject, and not a British subject.

(4.) Where the father, or the mother being a widow, has

(*f*) Bell's Prin. § 2134.
(*g*) 7 Anne, c. 5.
(*h*) 4 Geo. II. c. 21, § 1.
(*i*) 7 & 8 Vict. c. 66, § 3.
(*k*) 7 & 8 Vict. c. 66, § 16.
(*l*) 33 & 34 Vict. c. 14, § 14.
(*m*) 33 & 34 Vict. c. 14, § 2.
(*n*) 33 & 34 Vict. c. 14, § 10.

obtained a certificate of re-admission to British nationality, every child of such father or mother, who, during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents.

(5.) Where the father, or the mother, being a widow, has obtained a certificate of naturalisation in the United Kingdom, every child of such father or mother, who, during infancy, has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalised British subject.

General Rules in Personal Estate under Intestacy.

128. General Rules.—The following summary will show the mode of distribution in the several cases which usually occur in practice :—

I. *On Death of Husband survived by Wife and Child or Children.*
One-third to wife as *jus relictæ*.(*o*)
One-third to surviving child or children, of whatever marriage,(*p*) not forisfamiliated,(*q*) as *legitim*.(*r*) Issue of any predeceasing child or children do not take *legitim*,(*s*) nor does the heir-at-law in heritage, nor heir under entail,(*t*) unless he collates his heritage or life interest in estate. If heir sole next-of-kin, he is not bound to collate with widow.(*u*) Doctrine of collation extends to collaterals.(*v*)
Rest, being dead's part,(*w*) to child or children of whatever marriage, equally, as next-of-kin. Issue collectively of any predeceasing child taking an equal share with each of living children.(*x*) Above rules as to collation also obtain.

II. *On Death of Husband survived by Wife, but no Child.*
One-half to wife as *jus relictæ*—cannot take more.(*y*)

(*o*) § 91.
(*p*) Ersk. 3, 9, 17.
(*q*) § 118.
(*r*) § 100.
(*s*) Ersk. 3, 9, 17.
(*t*) Bell's Prin. § 1910-12.
(*u*) Bell's Prin. § 1911.
(*v*) Ersk. 3, 9, 3 ; also §§ 120-123 supra.
(*w*) § 114.
(*x*) 18 Vict. c. 23 ; also § 125 supra.
(*y*) Ersk. 3, 9, 23 ; Bell's Prin. § 1579.

The other half (being whole free moveable estate in sense of Intestacy Act) thus :—

If father alive, one-half (one-fourth of whole) to him(*z*); rest to brothers- and sisters-german equally(*a*), issue of any deceased taking parents' share (*b*); failing these, brothers- and sisters-consanguinean and their issue take.(*c*) Failing all collaterals, father takes at common law(*d*); failing him, brothers- or sisters-uterine, or their issue, take one-half.(*e*) Failing all these, whole to next-of-kin in order stated below.

If father dead, but mother alive, one-third of second half to her (*f*); rest same as in case of father surviving.

III. *On Death of Husband, predeceased by Wife, leaving Child or Children.*

One-half to surviving child or children as *legitim.*(*g*) See notes under No. I. as to *legitim.*

Rest to children as next-of-kin.(*h*) Issue collectively of any predeceasing child taking its parents' share.(*i*) See notes under No. I.

IV. *On Death of Husband, predeceased by Wife and Children; or a Person Dying Unmarried,*

Whole dead's part: if father alive, one-half to him (*k*); if dead, but mother alive, one-third to her (*l*); if both dead, whole to brothers or sisters, or other next-of-kin in same degree of relationship equally,(*m*) with representation among descendants and collaterals in competition with those nearer in degree.(*n*) See notes under No. II.

(*z*) 18 Vict. c. 23, § 3.
(*a*) Ersk. 3, 8, 9, and 3, 9, 2.
(*b*) 18 Vict. c. 23; Bell's Lect. 797.
(*c*) Ersk. 3, 9, 2, and 3, 9, 4; Bankton, 3, 4, 17, and 25.
(*d*) Ersk. 3, 8, 9, and 3, 9, 2.
(*e*) 18 Vict. c. 23, § 5.
(*f*) 18 Vict. c. 23, § 4.
(*g*) Bell's Prin. § 1581.
(*h*) *Ibid.* § 1592.
(*i*) 18 Vict. c. 23, § 1.
(*k*) *Ibid.* § 3.
(*l*) *Ibid.* § 4.
(*m*) Ersk. 3, 8, 9; 3, 9, 2.
(*n*) 18 Vict. c. 23, § 1.

V. *On Death of Wife, survived by Husband and Child or Children.*

1. *Law previous to* 18*th July*, 1881.

Whole to husband.(*o*) But any personal property of wife held exclusive of husband's legal rights, fell to her own children of whatever marriage,(*p*) with representation as above (*q*); and, failing children, to her own next-of-kin.(*r*) Order as in No. II.

2. *Law after* 18*th July*, 1881, *where wife possessed of separate personal estate.*

One-third to husband.(*s*)

One-third to surviving children of whatever marriage, equally, as *legitim.*(*t*)

Rest to children equally, with representation of any deceased child as before.(*u*)

The division in this case being subject to the same rules of law as in the case of the husband's estate. See No. I.

VI. *On Death of Wife, survived by Husband but no Child.*

1. *Law previous to* 18*th July*, 1881.

Whole to husband.(*v*) But any personal estate held by wife, exclusive of her husband's legal rights, fell to her own next-of-kin.(*w*) Mode of division same as case of second half under No. II.

2. *Law after* 18*th July*, 1881, *where wife possessed of separate personal estate.*

One-half to husband.(*x*)

Rest to wife's own next-of-kin.(*y*) Mode of division same as under No. II.

(*o*) Bell's Prin. § 1580; Ersk. 3, 9, 21.
(*p*) Bell's Lect. pp. 797, 798.
(*q*) 18 Vict. c. 23, § 1.
(*r*) § 84.
(*s*) 44 & 45 Vict. c. 21, § 6; also § 90 supra.
(*t*) *Ibid.* § 7.
(*u*) See § 125.
(*v*) 18 Vict. c. 23, § 6.
(*w*) Bell's Lect. pp. 797, 798.
(*x*) 44 & 45 Vict. c. 21, § 6; also § 90 supra.
(*y*) *Ibid.* § 7.

VII. *On Death of Wife, predeceased by Husband, leaving Child or Children.*

1. *Law prior to* 18*th July*, 1881.

Whole to child or children, of whatever marriage, equally (*z*), with representation in case of deceased children (*a*), as noted under No. I. regarding dead's part.

2. *Law after* 18*th July*, 1881.

One-half to surviving child or children as *legitim* (*b*).

Rest to children(*c*) under conditions noted under No. I. as regards dead's part.

VIII. *On Death of Wife, predeceased by Husband, without Children, or a person dying unmarried.*

Whole to next-of-kin(*c*)—divisible in manner noted as regards second half of estate under No. II.

ORDER OF SUCCESSION IN MOVEABLE ESTATE.

129. Order of Succession.—The following statement will show the operation of the rules of law within the ordinary limits. But it must be kept in view that unless legally excluded, discharged, or satisfied, the widow has by law her *jus relictæ*,(*d*) the surviving children their *legitim*,(*e*) and the widower a share corresponding in amount to the *jus relictæ* of his wife's estate,(*f*) and that it is only what is known as the "dead's part"(*g*) which falls under intestacy. Further, the mother and her relations, barring the two exceptions mentioned below,(*h*) are altogether excluded from succession in moveable estate, but children succeed to, and through their mother.(*i*)

I.—(1) Children; (2) grandchildren; (3) great-grandchildren; and so on until the descendants of the intestate be exhausted, with representation,—*i.e.*, the issue collect-

(*z*) Bell's Prin. §§ 1591, 1861.
(*a*) 18 Vict. c. 23, § 1.
(*b*) 44 & 45 Vict. c. 21, § 7.
(*c*) Ersk. 3, 9, 18.
(*d*) §§ 91-98.
(*e*) §§ 100-113.
(*f*) § 99.
(*g*) §§ 114-116.
(*h*) IV. 1.
(*i*) Bell's Prin. § 1861; Ersk. 3, 8, 9, and 3, 9, 2. See general rule of law, § 128.

ively of each child, predeceasing its parent, taking an equal share with each of the living children.(*k*)

Failing Descendants.

II.—(*a*) The father of the intestate, if alive, takes *one-half*, and, failing him, the mother, if alive, *one-third* of the free succession,—*i.e.*, the dead's part,—preferably to the intestate's collaterals, under sections 3 & 4 of the Moveable Succession Act of 1855.(*l*)

(*b*) (1) Brothers- and sisters-german; (2) nephews and nieces, children of brothers- and sisters-german; (3) grandnephews and nieces, grandchildren of brothers- and sisters-german; and so on until the collateral line flowing from brothers- and sisters-german be exhausted, with representation as aforesaid in the case of deceased successors.(*m*)

(*c*) (1) Brothers- and sisters-consanguinean,—*i.e.*, of the same father but not the same mother with the intestate; (2) nephews and nieces, children of brothers- and sisters-consanguinean; (3) grandnephews and nieces, grandchildren of brothers- and sisters-consanguinean; and so on, until the collateral line flowing from brothers- and sisters-consanguinean be exhausted, with representation as aforesaid in the case of deceased successors.(*n*)

Failing collaterals and their descendants.

III.—The father of the intestate at common law.(*o*)

Failing the father.

IV.—(1.) To the extent of *one-half* only of the *free* succession under the 5th section of the said Moveable Succession Act, the other half descending to the intestate's next-of-kin of the full blood:—(1) Brothers- and sisters-uterine,—*i.e.*, of the same mother but not the same father with the intestate; (2) nephews and nieces, children of brothers- and sisters-uterine; (3) grandnephews and nieces, grandchildren of brothers- and

(*k*) §§ 84, 125.
(*l*) § 74.
(*m*) §§ 19, 33, 53, 72, 125.
(*n*) §§ 86, 125.
(*o*) §§ 23, 33, 53.

sisters-uterine; and so on until the collateral line flowing from brothers- and sisters-uterine be exhausted, with representation as aforesaid in the case of deceased successors.(*p*)

(2.) (1) Uncles- and aunts-german, brothers and sisters of the father; (2) children of uncles and aunts, or cousins-german; (3) grandchildren of uncles- and aunts-german, and so on until the line flowing from the father's collateral german relations be exhausted, but *without* representation of deceased successors.(*q*)

(3.) (1) Uncles- and aunts-consanguinean, brothers and sisters of the father; (2) children of uncles and aunts, or cousins-consanguinean; (3) grandchildren of uncles- and aunts-consanguinean, and so on until the line flowing from the father's collateral consanguinean relations be exhausted, but without representation of deceased successor.(*r*)

Whom failing.

V.—The grandfather of the intestate.(*s*)

Whom failing.

VI.—(1.) (1) Greatuncles and aunts, brothers- and sisters-german of the grandfather; (2) children of great-uncles- and aunts-german; (3) grandchildren of greatuncles- and aunts-german, and so on until the line flowing from the grandfather's collateral german relations be exhausted, but without representation of deceased successors.(*t*)

(2.) (1) Greatuncles and aunts, brothers- and sisters-consanguinean of the grandfather; (2) children of greatuncles- and aunts-consanguinean; (3) grandchildren of greatuncles- and aunts-consanguinean, and so on until the line flowing from the grandfather's collateral consanguinean relations be exhausted, but without representation of deceased successor.(*u*)

Whom failing.

VII.—The great-grandfather of the intestate.(*v*)

(*p*) §§ 74, 87, 125.
(*q*) §§ 19, 33, 53, 72.
(*r* §§ 19, 33, 38, 53, 72.
(*s*) See Note (*r*).
(*t*) *Ibid.*
(*u*) *Ibid.*
(*v*) *Ibid.*

Whom failing.

VIII.—The great-grandfather's collaterals succeed in the same order as stated above in No. VI.; and failing them, the great-great-grandfather, and after him his collaterals in the same order, and so on upwards, as far as propinquity can be traced.

Failing heirs connected by blood with the intestate the Crown takes the whole succession as *ultimus hæres.*(*w*)

(*w*) See Note (*r*); also §§ 65, 66.

TABLE

SHEWING MODE IN WHICH PERSONAL ESTATE IS DIVISIBLE UNDER AN INTESTACY,

ACCORDING TO BOTH

ENGLISH AND SCOTTISH LAW.

	If Intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		I. Husband Dying Survived
(1.)	Wife and child or children.	One-third to wife. Rest to child or children, except such child or children, not heir-at-law, who had estate by settlement of intestate or were advanced by him in his lifetime equal to other shares, §§ 222, 224, 213-218.
(2.)	Wife, children, and issue of predeceasing children.	One-third to wife. Rest to children and grandchildren, the former taking *per capita* and the latter *per stirpes*, §§ 222, 224, 213-218.
(3.)	Wife and grandchildren.	One-half to wife. Rest to grandchildren equally, §§ 222, 224, 213-218.
(4.)	Wife and his children by two or more marriages.	One-half to wife. Rest to children equally, §§ 222, 224, 213-218.
(5.)	Wife and children by her last and former marriage.	One-half to wife. Rest to intestate's children equally, §§ 222, 224, 213-218.

Representatives take as follows :—

II. According to Law of Scotland.

by Wife and Children.

One-third to wife, as *jus relictæ*, §§ 91-93. (1.)
One-third to husband's child or children, as *legitim*, §§ 100-106.
Rest, being dead's part, to husband's child or children, as next-of-kin, §§ 84, 88, 114-116, 125, 126.
The *jus relictæ* may be barred, but not defeated, §§ 94-98.
Legitim may be barred, but not defeated, §§ 101, 107-110.
Advances by father to children, how accounted, § 111.
Heir-at-law excluded from division, unless he collates heritage, §§ 120-123.

One-third to wife, as *jus relictæ*, §§ 91-93. (2.)
One-third to husband's surviving children, as *legitim*, §§ 100-106.
Rest, being dead's part, to children and grandchildren, the former taking *per capita* and the latter *per stirpes*, §§ 84, 114-116, 125, 126.
(Read notes under No. 1 as to *jus relictæ*, *legitim*, &c).

One-half to wife, as *jus relictæ*, §§ 91-93. (3.)
Rest, being dead's part, to grandchildren equally, as next-of-kin, §§ 88, 114-116.
Grandchildren take as next-of-kin, not by representation. *Turner*, 27th November, 1869.
(Read notes under No. 1 as to *jus relictæ*, heir-at-law, &c.)

One-third to wife, as *jus relictæ*, §§ 91-93. (4.)
One-third to children equally, as *legitim*, §§ 100-106.
Rest, being dead's part, to children equally, as next-of-kin, §§ 84, 114-116, 126.
(Read notes under No. 1 as to *jus relictæ*, heir-at-law, advances to children, &c.)

One-third to wife, as *jus relictæ*, §§ 91-93. (5.)
One-third to husband's children equally, as *legitim*, §§ 100-106.
Rest, being dead's part, to them as next-of-kin, §§ 84, 88, 114-116, 126.
(Read notes under No. 1.)

	If Intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		II. Husband Dying Survived
(6.)	Wife only.	One-half to wife. Rest to next-of-kin in equal degree to intestate or their legal representatives, §§ 222, 213, 230.
		III. Husband Dying Predeceased
(7.)	Children.	Equally, §§ 224, 213-218.
(8.)	Children and issue of predeceased children.	Whole to children *per capita*, and to issue of deceased children *per stirpes* §§ 224, 213-218.
(9.)	Grandchildren.	Equally, §§ 224, 213-218.
(10.)	Children by two or more marriages by him.	Equally, §§ 224, 213-218.
(11.)	Children by wife's last and a former marriage.	Whole to children of intestate's marriage, in equal shares, §§ 224, 213-218.

Representatives take as follows:—

II. According to Law of Scotland.

by Wife without Children.

One-half to wife as *jus relictæ*, §§ 91, 94, 98.
Rest to husband's next-of-kin, §§ 84, 125. (6.)

by Wife leaving Children.

One-half to husband's children as *legitim*, §§ 100-106.
Rest to them as next-of-kin, §§ 84, 88, 114-116, 125, 126.
(Read notes under No. 1 as to heir-at-law, &c.) (7.)

One half to children as *legitim*, §§ 100-106.
Rest to children and issue of those deceased; the former taking *per capita* and the latter *per stirpes*, §§ 84, 114-116, 125, 126.
(Read notes under No. 1 as to *legitim*, heir-at-law, &c.) (8.)

Equally, §§ 125, 126. (9.)

One-half to children of whatever marriage in equal shares, as *legitim*, §§ 100-106.
Rest, being dead's part, to them equally as next-of-kin, §§ 84, 125, 126.
(Read notes under No. 1 as to *legitim*, heir-at-law, &c.) (10.)

One-half to husband's children as *legitim*, §§ 100-106.
The rest, being dead's part, to them as next-of-kin, §§ 84, 88, 114-116, 125, 126.
(Read notes under No. 1 as to *legitim*, heir-at-law, &c.) (11.)

	If Intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		IV. Husband Dying Predeceased by
(12.)	Father only.	Whole to father, § 225.
(13.)	Mother only.	Whole to mother, § 226.
(14.)	Father and mother.	Whole to father, §§ 225, 226.
(15.)	Father, mother, and brothers or sisters.	Whole to father, §§ 225, 226.
(16.)	Father, and brothers or sisters.	Whole to father, §§ 225, 226.
(17.)	Mother, and brothers or sisters.	Whole to them equally, § 226.
(18.)	Father, mother, brothers or sisters, and children of predeceased brothers or sisters.	Whole to father, §§ 225, 226.
(19.)	Father, brothers, or sisters, and children of predeceased brothers or sisters.	Whole to father, §§ 225, 226.
(20.)	Mother, brothers, or sisters, and children of predeceased brothers or sisters.	Whole to mother and brothers and sisters *per capita*, and to children *per stirpes*, §§ 226, 214-216.

Representatives take as follows:—

II. According to Law of Scotland.

Wife without Issue; or a Man Dying Unmarried.

(12.) One-half to father under Intestacy Act, 1855, §§ 74, 128.
Rest to him at common law, §§ 74, 128.

(13.) One-third to mother under Intestacy Act, 1855, § 88.
Rest to deceased's next-of-kin, §§ 84, 88, 114-116, 125.

(14.) One-half to father under Intestacy Act, 1855, §§ 74, 128.
Rest to him at common law, §§ 74, 128.

(15.) One-half to father under Intestacy Act, 1855, §§ 74, 128.
Rest to brothers or sisters equally as next-of-kin, §§ 88, 125.

(16.) Division same as in No. 15.

(17.) One-third to mother under Intestacy Act, 1855, § 88.
Rest to brothers or sisters equally as next-of-kin, §§ 84, 88, 125.

(18.) One-half to father under Intestacy Act, 1855, §§ 74, 128.
Rest to brothers or sisters and children of those deceased; the former taking *per capita* and the latter *per stirpes*, §§ 88, 125.

(19.) Division same as in No. 18.

(20.) One-third to mother under Intestacy Act, 1855, §§ 88, 128.
Rest to brothers or sisters and children of those deceased; the former taking *per capita* and the latter *per stirpes*, § 125.

	If Intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		IV. Husband Dying Predeceased by Wife
(21.)	Father, mother, and children of predeceased brothers or sisters.	Whole to father, §§ 225, 226.
(22.)	Father, and children of predeceased brothers or sisters.	Whole to father, § 225.
(23.)	Mother, and children of predeceased brothers or sisters.	One share to mother corresponding with number of deceased brothers or sisters. Rest to children *per capita* (*Stanley* v. *Stanley*, 1 Atk. 455), §§ 226, 213-216.
(24.)	Father, mother, children, and grandchildren of predeceased brothers or sisters.	Whole to father, § 225.
(25.)	Father, children, and grandchildren of predeceased brothers or sisters.	Whole to father, § 225.
(26.)	Mother, children, and grandchildren of predeceased brothers or sisters.	Whole to mother and children; the children taking the shares which their respective parents and grand-parents would have taken if alive, §§ 226, 213-216, 221.
(27.)	Brothers or sisters only.	Whole to them equally, §§ 226, 213-215.
(28.)	Brothers and sisters and nephews or nieces, children of predeceased brothers or sisters.	Whole to brothers and sisters *per capita*, and children *per stirpes*, §§ 226, 213-216.

Representatives take as follows:—

II. According to Law of Scotland.

without Issue; or a Man Dying Unmarried—*continued.*

One-half to father under Intestacy Act, 1855, §§ 74, 88, 128. Rest to children equally, § 128.	(21.)
Division same as in No. 21.	(22.)
One-third to mother under Intestacy Act, 1855, § 88. Rest to children equally, §§ 125, 128.	(23.)
One-half to father under Intestacy Act, 1855, §§ 74, 88, 128. Rest to children and grandchildren; the former taking *per capita* and the latter *per stirpes*, §§ 84, 125.	(24.)
Division same as in No. 24.	(25.)
One third to mother under Intestacy Act, 1855, §§ 88, 128. Rest to children *per capita*, and grandchildren *per stirpes*, §§ 125, 128.	(26.)
Equally, § 128.	(27.)
Whole to brothers or sisters *per capita*, and children *per stirpes*, § 125.	(28.)

	If Intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		IV. Husband Dying Predeceased by
(29.)	Brothers or sisters, and grand-nephews or nieces, children of predeceased brothers' or sisters' deceased children.	Whole to brothers or sisters equally, §§ 226, 213-216, 221.
(30.)	Brothers or sisters, nephews or nieces, and grand-nephews or nieces children of predeceased brothers or sisters and of their deceased issue.	Whole to brothers or sisters *per capita*, and nephews or nieces *per stirpes*, §§ 226, 213-216.
(31.)	Nephew or nieces, children of predeceased brothers or sisters.	Equally if no grandfather or uncles or aunts, §§ 226, 230, 213-215.
(32.)	Grand-nephews or nieces, children of predeceased brothers or sisters, deceased children.	Equally if no grandfather or uncles or aunts, §§ 226, 230, 213-215.
(33.)	Nephews or nieces, and grand-nephews or nieces, children of predeceased brothers or sisters, and of their deceased issue.	Whole to nephews or nieces, *per capita*, §§ 226, 230, 213-216.
(34.)	Brothers- or sisters-german, and brothers- or sisters-consanguinean.	Equally, §§ 226, 230, 213-215.
(35.)	Brothers- or sisters-consanguinean, and brothers- or sisters-uterine.	Equally (see *Jessopp* v. *Watson*, 1 M. & K. § 655 : also §§ 214, 215, 226, 230.

Representatives take as follows:—	
II. According to Law of Scotland.	
Wife without Issue; or a Man Dying Unmarried—*continued.*	
Whole to brothers or sisters *per capita*, and children *per stirpes* in the place of their deceased grand-parents, §§ 125, 128.	(29.)
Whole to brothers or sisters *per capita*, to nephews or nieces *per stirpes*, and to grand-nephews or nieces *per stirpes*, as in the place of their grand-parents, §§ 125, 128.	(30.)
Equally, §§ 125, 128.	(31.)
Equally, §§ 125, 128.	(32.)
Whole to nephews or nieces, *per capita*, and to grand-nephews or nieces, *per stirpes*, §§ 125, 128.	(33.)
Whole to brothers- or sisters-german equally, §§ 84-86, 125.	(34.)
Whole to brothers- or sisters-consanguinean equally, §§ 86, 87, 125.	(35.)

	If Intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		IV. Husband Dying Predeceased by
(36.)	Brothers- or sisters-consanguinean, and uncles and aunts.	Whole to brothers- or sisters-consanguinean equally, §§ 226, 213-215.
(37.)	Brothers- or sisters- uterine and uncles or aunts.	Whole to brothers- or sisters-uterine, §§ 226, 213-215.
(38.)	Father and brothers- or sisters- consanguinean and uterine.	Whole to father, §§ 225, 214, 215.
(39.)	Mother and brothers or sisters- consanguinean and uterine.	Whole to mother and to brothers- or sisters-consanguinean and uterine equally, §§ 226, 213-215.
(40.)	Father, mother, and uncles or aunts.	Whole to father, §§ 225, 226, 213-215.
(41.)	Father and uncles and aunts.	Whole to father, § 225.
(42.)	Mother and uncles and aunts.	Whole to mother, § 226.
(43.)	Mother, uncles or aunts, and cousins - german, children of predeceased uncles or aunts.	Whole to mother, § 226.

Representatives take as follows:—

II. According to Law of Scotland.

Wife without Issue; or a Man Dying Unmarried—*continued.*

Whole to brothers- or sisters-consanguinean equally, §§ 86, 128.	(36.)
One-half to brothers- or sisters-uterine equally, §§ 87, 128. Rest to uncles or aunts equally, § 128.	(37.)
One-half to father under Intestacy Act, 1855, § 74. Rest to brothers- or sisters-consanguinean equally, §§ 86, 87.	(38.)
One-third to mother under Intestacy Act, 1855, §§ 74, 88. Rest to brothers- or sisters-consanguinean equally, §§ 86, 87, 128.	(39.)
Whole to father at common law, § 128.	(40.)
Whole to father at common law, § 128.	(41.)
One-third to mother under Intestacy Act, 1855, §§ 74, 88. Rest to uncles and aunts equally, § 128.	(42.)
One-third to mother under Intestacy Act, 1855, §§ 74, 88. Rest to uncles or aunts equally, § 128.	(43.)

	If Intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		IV. Husband Dying Predeceased by
(44.)	Father and cousins-german.	Whole to father, § 225.
(45.)	Mother and cousins-german.	Whole to mother, § 226.
(46.)	Great-nephews and nieces and cousins-german.	Equally, § 226.
(47.)	Brothers' grandchildren, and brothers- or sisters-consanguinean.	Whole to brothers- or sisters-consanguinean equally, §§ 226, 214.
(48.)	Cousins-german and children of predeceased cousins-german.	Whole to cousins-german equally, §§ 226, 213-216.
(49.)	Uncles or aunts, and children of great-uncles or aunts.	Whole to uncles or aunts equally, §§ 226, 213-216.
(50.)	Great- uncles' or aunts' children, and children of cousins-german.	Equally, §§ 226, 213-216.
(51.)	Grandfather and uncles or aunts.	Whole to grandfather, § 227.
(52.)	Grandfather, and uncles- or aunts-consanguinean.	Whole to grandfather, § 227.
(53.)	Grandfather, grandmother, and great-uncles or aunts.	Equally to grandfather and grandmother (see *Woodroff* v. *Wickworth*, Prox. Chanc. § 527).
(54.)	Grandfather, grandmother and mother.	Whole to mother, § 226.

Representatives take as follows :—	
II. According to Law of Scotland.	
Wife without Issue; or a Man Dying Unmarried—*continued.*	
Whole to father at common law, §§ 128, 129.	(44.)
One third to mother under Intestacy Act, 1855, §§ 74, 88. Rest to cousins-german equally, §§ 128, 129.	(45.)
Whole to great-nephews or nieces equally, §§ 128, 129.	(46.)
Whole to brothers' grandchildren equally, §§ 128, 86, 129.	(47.)
Whole to cousins-german equally, §§ 128, 129.	(48.)
Whole to uncles or aunts equally, §§ 128, 129.	(49.)
Whole to children of cousins-german equally, §§ 128, 129.	(50.)
Whole to uncles or aunts equally, §§ 128, 129.	(51.)
Whole to uncles- or aunts-consanguinean equally, §§ 128, 129.	(52.)
Whole to grandfather, §§ 128, 129.	(53.)
One-third to mother under Intestacy Act, 1855, § 88. Rest to grandfather, §§ 128, 129.	(54.)

	If Intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		IV. Husband Dying Predeceased by
(55.)	Great-grandfather and great- uncle's or aunt's children.	Whole to great-grandfather, § 228.
(56.)	Great-grandfather, great-grandmother, and brother's or sister's illegitimate children.	Equally to great-grandfather and great-grandmother, § 228.
(57.)	Father's father and mother's mother.	Equally (see *Metney* v. *Petty*, Prox. Chanc. § 593), also §§ 227, 215.
		V. Wife Dying Survived
(58.)	Husband and children of marriage.	Whole to husband, § 223.
(59.)	Husband, children of marriage, and issue of deceased children.	Whole to husband, § 223.

Representatives take as follows :—

II. According to Law of Scotland.

Wife without Issue; or Man Dying Unmarried—*continued.*

Whole to children equally, §§ 128, 129.		(55.)
Whole to great-grandfather, §§ 128, 129.		(56.)
Whole to father's father, §§ 88, 128, 129.		(57.)
by Husband and Children.		
1. Where wife died previous to 18th July, 1881.	2. Where wife died subsequent to 18th July 1881, possessed of separate personal estate.(*a*)	
Whole to husband, excepting paraphernalia and peculium, §§ 114, 117, 119.	One-third to husband, §§ 90, 99. One-third to children as *legitim*, § 113. Rest, being dead's part, to children as next-of-kin, § 114. (Read notes under No. 1, these being now applicable to a wife's estate.)	(58.)
Whole to husband, excepting paraphernalia and peculium, §§ 114, 117, 119.	One-third to husband, §§ 90, 99. One-third to surviving children, as *legitim*, § 113. Rest, being dead's part, to surviving children *per capita*, and issue of deceased children *per stirpes*, §§ 84, 114-116, 125, 126. (Read notes under No. 1 as to husband's rights, children's *legitim*, and heir-at-law.)	(59.)

(*a*) Read §§ 78, 90.

	If Intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		V. Wife Dying Survived
(60.)	Husband and grandchildren.	Whole to husband, § 223.
(61.)	Husband and children by the wife's last and a former marriage.	Whole to husband, § 223.
		VI. Wife Dying Survived by
(62.)	Husband.	Whole to husband, § 223.
		VII. Wife Dying Predeceased by
(63.)	Children.	Whole to children equally, §§ 224, 213, 214.
(64.)	Children and issue of predeceased children.	Whole to children *per capita*, and issue of deceased children *per stirpes*, §§ 224, 213-216.

Representatives take as follows:—		
II. According to Law of Scotland.		
by Husband and Children	*—continued.*	
1. Where wife died previous to 18th July, 1881.	2. Where wife died subsequent to 18th July, 1881, possessed of separate personal estate.(*a*)	
Whole to husband, §§ 128, 129. See also No. 58.	One-half to husband, §§ 90, 99. Rest to grandchildren equally, § 114.	(60.)
Whole to husband, §§ 128, 129. See also No. 58.	One-third to husband, §§ 90, 99. One-third to wife's children of both marriages, as *legitim*, § 113. Rest, being dead's part, to these children equally, § 88. (Read notes under No. 1 as to exclusion of legal rights.)	(61.)
Husband without Children.		
Whole to husband, §§ 128, 129. See also No. 58.	One-half to husband. Rest to wife's next-of-kin.	(62.)
Husband leaving Children.		
1. Where wife died previous to 18th July, 1881.	2. Where wife died subsequent to 18th July, 1881, possessed of separate personal estate.(*a*)	
Whole to children equally, §§ 88, 128.	One-half to children as *legitim*, § 113. Rest to them as next-of-kin, §§ 88, 128.	(63.)
Whole to children *per capita*, and issue of deceased children *per stirpes*, §§ 88, 125.	One-half to children as *legitim*, § 113. Rest, being dead's part, to children *per capita*, and issue of deceased children *per stirpes*, §§ 114-116, 128.	(64.)

(*a*) Read §§ 78, 90.

	If intestate die leaving	Next-of-Kin or
		I. According to Law of England.
		VII. Wife Dying Predeceased by
(65.)	Children of husband's last and a former marriage.	Whole to wife's children equally, §§ 224, 213-215.
(66.)	Children by two or more marriages of wife.	All equally, §§ 224, 213, 214.
		VIII. Wife Dying Predeceased
(67.)	Next-of-Kin.	See order of succession below, §§ 230, 213-215.

Representatives take as follows:—

II. According to Law of Scotland.

Husband leaving Children.

1. Where wife died previous to 18th July, 1881.	2. Where wife died subsequent to 18th July, 1881, possessed of separate personal estate.(*a*)	
Whole to wife's children equally, §§ 88, 128.	One-half to wife's children as *legitim*, § 113. Rest, being dead's part, to them as next-of-kin, §§ 88, 128.	(65.)
All equally, §§ 88, 128.	One-half to whole children equally as *legitim*, § 113. Rest, being dead's part, to them as next-of-kin, §§ 88, 128.	(66.)

by Husband without Children; or, a Woman dying unmarried.

(67.) The estates of widows and unmarried women not being affected by the Married Women's Property Act, 1881, fall to be distributed in the same manner as the estates of men dying unmarried. The Intestacy Act, 1855 (§§ 3, 4, and 5) appears at first sight to deal with the estates of male persons only. It defines "Intestate" as meaning and including every person deceased who has left undisposed of . . . estate in which *he* might . . . have tested; and throughout it speaks generally in the masculine gender. But, in reading all Acts of Parliament, it has to be kept in view that words importing the masculine gender must be taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender or number is expressly provided (13 Vict. c. 21).

(*a*) Read §§ 78, 90.

STEPS TO BE TAKEN ON OCCURRENCE OF A DEATH.

131. First thing to be done after Death.—Where the moveable estate left by the deceased is considerable, or where any of the next-of-kin is absent, it is advisable to have the repositories sealed immediately on the occurrence of death. This act is properly performed by a notary public, clergyman, magistrate, or medical attendant, but any respectable person present not directly interested in the succession may perform it. Where persons are in a dying state in lodging houses or inns, the duty of sealing devolves on the master or mistress of the house, who should deliver the keys of the sealed repositories to the Sheriff.(*a*) By an old Act of Sederunt,(*b*) a presumptive vitious intromission is established, against persons having charge of the dying whose heirs happen to be minors, if they do not seal or lock the repositories of such persons as soon as they become insensible.(*c*)

132. Sheriff may be asked to have Repositories Sealed.—Where the intestate has no near relative to look after his affairs, and these are under the charge of servants, or where the next-of-kin feel uncertain whether there will be a sufficiency of assets to meet the debts, or where a creditor of the intestate desires to be appointed executor-dative, a petition may be presented to the Sheriff at the instance of any person having interest, for an order to seal the repositories and to take possession of the estate until an executor shall be appointed.

133. Suggestive Form of Petition.—Each petition will depend upon its own particular circumstances, but the following may serve as an example:—

> Unto the Honourable the Sheriff of the Lothians, the petition of A. B., grocer, of No. Hanover Street, Edinburgh, nephew and one of the next-of-kin [or a creditor or otherwise], of the late C. D., painter, who resided at No. George Street, Edinburgh.
>
> Humbly sheweth,
>
> That the said C. D. died within the dwelling No. George Street, aforesaid, on the day of .

(*a*) Ersk. 3, 9, 49-56.
(*b*) A. of S. 23rd Feb. 1692.
(*c*) See § 134.

That the petitioner is one of the next-of-kin [or a creditor, or otherwise], of the said deceased, and [here state the necessity for the application].

May it therefore please your Lordship to appoint some proper person or persons to seal the repositories of the said deceased C. D., with the seal of Court, and after the deceased shall have been interred, to remove the seals and to make and lodge in Court an inventory of the documents of value and whole property of every description which belonged to the deceased.

According to justice, &c.

134. Vitious Intromitters with Intestate's Estate; their Liability.—No person is entitled to intromit or interfere with the moveable estate of an intestate, without a proper title from the Court, and any person acting otherwise fixes on himself the character of a vitious intromitter, and so renders himself liable to those interested in the estate(*d*) for the whole of the deceased's debts.(*e*) The assumption of the character is tested in this way; whether the acts done were referable to kindness and charity only, or were such as none but a rightful executor had power to do.

In illustration of the operation of this rule of law we shall notice:—

1. *Cases where the liability is incurred.*—The liability is incurred by receiving money and paying debts without having given up an inventory of the estate and obtaining confirmation, not on the ground of fraud, but in consequence of "possession being taken contrary to the due order of law.(*f*)" A decree-dative without confirmation is not enough,(*g*) excepting (1) where the next-of-kin, or executor, is in possession; (2) where the debtor is willing to pay without confirmation, or has signed a bond of corroboration, or (3) where the thing, or debt, has been specially conveyed by the deceased.(*h*) This liability is not confined to strangers intromitting with moveable estate of the deceased, but extends to the heir or executors who uplift funds, or take possession without giving up an inventory,(*i*) also to executors confirmed, who intromit with more than is given up in the inventory confirmed.(*j*) It is inferred

(*d*) Ersk. 3, 9, 49; Bell's Prin. § 1921; M'Laren, § 2268.

(*e*) *Simpson*, 1854, 17 D. 33.

(*f*) *Forbes*, 12th June, 1823, 2 Sh. 395.

(*g*) *Cunningham*, 1827, 5 Sh. 315.

(*h*) Ersk. 3, 9, 30.

(*i*) *Davidson*, 13th Dec. 1867, 6 M. 151.

(*j*) Ersk. 3, 9, 49.

by interference with the deeds or documents of the deceased, except where these have been inventoried or other precautions taken(*k*); also by secretly opening sealed repositories and carrying off articles of value,(*l*) or privately removing the deceased's effects.(*m*)

2. *Cases where the liability is not incurred.*—The liability is not incurred by acts referable to kindness or charity, or to a claim of right in the actor, inconsistent with any administrative character, or by an intromission in circumstances inferring the absence of fraud, and where a check is afforded on it(*n*); nor by intromissions by a widow after giving up inventory, but before obtaining confirmation, the intromitter being only required to account(*o*); nor by a widow simply continuing to possess the moveables left by her husband.(*p*)

3. *Cases where the liability is purified.*—The liability is purged by confirmation before action, or within a year and day from the opening of the succesion, where the intromitter is a relict, or one of the next-of-kin or personal representatives, but not where it is as executor-creditor merely(*q*); and it is discharged by creditors approving the proceedings or accepting a dividend.(*r*)

4. *By whom the liability is pleadable.*—The liability is pleadable only by the creditors of the deceased, not by his executors or next-of-kin; and it is not pleadable by heritable creditors until after discussing the heirs. As the liability arises *ex delicto* it cannot be founded on against the heir of the intromitter, but if the action be restricted to simple restitution it may be insisted in against the intromitter's representatives.(*s*)

5. *The liability of intromitters among themselves.*—Vitious intromitters are liable for one another, so a creditor may sue any one of them for the debt due to him, the intromitter who pays having a claim of relief *pro rata* against his co-delinquents; but if he sues them together they are each liable in equal sums according to their number, not according to the extent of their intromissions.(*t*)

(*k*) *Crawford*, 1833, 11 Sh. 441.
(*l*) *Scott*, 25th May, 1821, 1 Sh. 33.
(*m*) *Campbell*, 1755, 5 Br. Sup. 838.
(*n*) *Dudgeon*, 9th March, 1844, 6 D. 1015; *Adam*, 17th June, 1854, 16 D. 964; 26 Jur. 500.
(*o*) *Barbour*, 19th Nov. 1824, 3 Sh. 299, N. E. 210.
(*p*) *Thomson*, 1834, 13 Sh. 143.
(*q*) Bell's Prin. § 1921.
(*r*) M'Laren, § 2268.
(*s*) Ersk. 3, 9, 54.
(*t*) Ersk. 3, 9, 55.

135. Circumstances under which Executors Dative are Appointed.—The cases in which the appointment of an executor-dative takes place are usually these :—Where the deceased has not left any valid testamentary deed, or the deed he has left does not appoint anyone as executor, or the person appointed executor refuses, or is, or becomes, incapable to act, or is abroad, or dies before completing his duties.

136. The Purpose of Appointing an Executor.—The office of an executor-dative is a trust for the purpose of collecting the moveable estate of the intestate, and after paying thereout the intestate's debts,(*u*) distributing the residue amongst those legally entitled thereto. The executor derives his power and authority solely from the Court, and he has otherwise no right or interest in the intestate's estate. An executor was held not entitled even to a commission for managing a farm, part of the executry estate.(*v*)

137. The Subjects of an Executor's Administration.—These include all that fall to the deceased's widow, children, and next-of-kin, or personal representatives, and that belong to creditors.(*w*) The aggregate free estate receives the general name of executry, or free moveable estate.(*x*)

138. Executors—Different Classes.—Executors are distinguished in law as :—

Executors-dative—*i.e.*, executors appointed by the Sheriff where none have been appointed by the deceased, or where those appointed by the deceased have refused or declined to accept the office, or are incapable of acting.

Executors-nominate—*i.e.*, those appointed by the deceased.

Executors-creditors—*i.e.*, persons who, upon the failure of the executors legally entitled by relationship or beneficial interest to expede confirmation, attach by the appropriate diligence of confirmation a portion of their debtors' estate out of which to recover the debt due to themselves.(*y*)

Executors *ad omissa male appreciata.*—These are persons interested in the succession who are entitled to be confirmed to

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(*u*) *Lamond's Trs.* 8th March, 1871, 9 M. 662.

(*v*) *Malcolm*, 10th Dec. 1869, 8 M. 272.

(*w*) Ersk. 3, 9, 1 ; Bell's Com. 1, 141 ; *M'Kie*, 1628, M. 1788.

(*x*) 18 Vict. c. 23, § 9.

(*y*) *A. of S.*, 14th Nov. 1679 ; Bell's Prin. § 1895.

subjects which the proper executors confirmed have either omitted out of the inventory of the estate or have estimated in such inventory below their just value.(*z*)

Executors *ad non executa.*—These are appointed in cases where the proper executor dies before obtaining possession of the deceased's moveables.(*a*)

In the law language of England, executors-dative and executors-nominate are respectively styled administrators, and executors-testamentary, or merely executors.(*b*)

139. Who may be Executors-Dative.—Usually the relatives meet after the funeral and arrange that one or more of their number apply to the Sheriff for the office of Executor-Dative, but where no such arrangement is come to, the office is conferred by the Sheriff in the following order(*c*) :—

1. The deceased's general disponee, or universal legatory or residuary legatee under a testamentary writing. The nomination of a person as such disponee, legatory or legatee, is not of itself sufficient to confer the office of executor, neither will a grant of the liferent of a succession, with a power of disposal, entitle the liferenter to compete for the office with the next-of-kin or legatees of the reversionary interest.(*d*) But the term "executor" is not a *vox signata* which must necessarily be used in conferring the office. Thus the words "with power to see this will executed" was held to confer the office.(*e*)
2. The next-of-kin—*i.e.*, surviving children, if any, or the other nearest relations, all in the same degree alive, with the representatives of deceased next-of-kin, if any, who survived the intestate(*f*)—being entitled to be conjoined in the office if they please, or they may select one person for the office.(*g*) When no next-of-kin compete, the children or descendants of next-of-kin predeceasing are entitled to confirm(*h*); and it is no objection to their being so confirmed that they have no beneficial interest in the executry

(*z*) Ersk. 3, 9, 36.
(*a*) M'Laren, § 1685.
(*b*) Paterson, § 680.
(*c*) M. Styles, 650.
(*d*) *M'Gown*, 4th Dec. 1835, 14 Sh. 105.
(*e*) *Dundas*, 27th Jan. 1837, 15 Sh. 427.
(*f*) 4 Geo. IV. c. 98, § 1.
(*g*) Ersk. 3, 9, 32. *Webster*, 26th Oct. 1878, 16 S.L.R. 45.
(*h*) 18 Vict. c. 23, § 1; *Dowie*, 18th March, 1871, 9 Macp. 726.

funds.(*i*) The full blood excludes the half blood in the same degree.(*j*) Where the deceased has died unmarried and without issue, his father, or if he be dead, his mother, may, it appears, be nominated jointly with his brothers and sisters or their descendants.(*k*) In the succession of a deceased child the mother may be appointed in the absence of others having a preferable title.(*l*) All maternal relations, excepting brothers- and sisters-uterine, and their issue, are excluded.(*m*) Pupils who are next-of-kin may be decerned through a tutor, and minors in their own name or through a curator(*n*); or each may be decerned in his own name and act through his guardian, the tutor taking the oath in the pupil's case, and the curator concurring in the oath in the minor's case.(*o*) Under the Pupils Protection Acts, the Court may confirm a factor in his own name in relation to the estates of pupils, absent persons and persons under mental incapacity in Scotland.(*p*)

3. The widow who is called executrix *qua relict.*(*q*)
4. Creditors who hold liquid documents of debt—*i.e.*, debts constituted against the deceased either by a written obligation or by a decree of Court, as bonds, bills, decrees, or the like, called executors-creditors.(*r*) If the creditor's debt be not liquid he must proceed to constitute it in the usual manner.(*s*) An office copy of judgment for debt in English Court is sufficient to warrant confirmation as executor-creditor.(*t*)
5. Special legatee, including the assignee of a beneficial interest.(*u*) Special legacies—*i.e.*, of a sum of money or the like—vest by survivance, but confirmation is necessary to

(*i*) *Bones*, 21st Dec. 1866; 5 Macp. 240.

(*j*) *Infra*, §§ 128, 129.

(*k*) 18 Vict. c. 23, §§ 3 and 4; Bell's Lect. 1042.

(*l*) *Muir*, 3rd Nov. 1876, 4 R. 74.

(*m*) 18 Vict. c. 23, § 5. This rule does not apply to the separate personal estates of wives, 44 & 45 Vict. c. 21.

(*n*) *Swayne*, 8th June, 1822; *Johnstone*, 15th Feb. 1838, 16 Sh. 541, 19 & 20 Vict. c. 59, § 19; 21 & 22 Vict. c. 76, § 21; 23 & 24 Vict. c. 143, § 38.

(*o*) Fraser, 2, 118.

(*p*) 12 & 13 Vict. c. 51; 43 & 44 Vict. c. 4.

(*q*) *Muir*, 3rd Nov. 1876, 4 R. 74.

(*r*) Bell's Prin. § 1895; 1695, c. 41.

(*s*) *Infra*, §§ 197, 198.

(*t*) *Stiven*, 12th Feb. 1868, 6 Macp. 370.

(*u*) *M'Pherson*, 7th Feb. 1855; 17 D. 358.

enforce payment. Specific legacies—*i.e.*, of a particular debt, bill, bond, watch, or the like, can be recovered without confirmation.(*v*)

6. Judicial factors under § 7 of the Act of Sederunt, 13th Feb. 1730, may confirm factory estates in their own name as executors-dative.(*w*)
7. The estates of subjects of any foreign State, with which there is a convention, dying in Her Majesty's dominions may, if there be no person present at the time of the death who shall be rightfully entitled to administer, be administered by the consul, vice-consul, or consular agent of the foreign State in question.(*x*)
8. The Treasury Solicitor may administer any personal estate of an Intestate or otherwise accruing to the Crown.(*y*)
9. As regards a wife's separate personal estate, the order of legal preference to the office of executor to her is the same as above.(*z*)

It is competent to confirm two persons as joint-executors though claiming the office in different characters.(*a*)

Questions of competition may be appealed from the Sheriff-substitute to the Sheriff-depute, and the judgment of the latter is subject to review by the Court of Session.(*b*)

Where the propinquity of an executor confirmed is challenged by a competing claimant, the proper remedy is an action of reduction of the testament-dative or confirmation.(*c*)

It has been held competent even after the lapse of seventeen months to repone a nearer relation claiming the office of executor-dative.(*d*)

140. What Courts may Appoint Executors.—The Court of the domicile(*e*) decides all questions between competitors for the office of executor.(*f*) Where the estate is situated furth of Scotland the office may be conferred either by the Court of the domicile

(*v*) M. Styles, 651.
(*w*) M'Laren, § 1673; Bell's Lect. 1042.
(*x*) 24 & 25 Vict. c. 121, § 4.
(*y*) 39 & 40 Vict. c. 18 (1876).
(*z*) *Leighton*, 25 Scot. Jur. 63; 44 & 45 Vict. c. 21, §§ 6, 7.
(*a*) *Muir*, 3rd Nov. 1876, 4 R. 74.
(*b*) 4 Geo. IV. c. 97, § 10.
(*c*) *Swinton*, 20th March, 1862, 24 D. 833; *Dowie*, 18th March, 1871, 9 Macp. 726.
(*d*) *Macpherson*, 7th Feb. 1855, 17 D. 357.
(*e*) § 82.
(*f*) Ersk. 3, 9, 32.

or by the Court within whose jurisdiction the subjects are situated and sought to be recovered,(*g*) and the Court in which proceedings are first instituted is entitled to act without reference to proceedings taken in another.(*h*) The *lex loci* determines the character of the property, and the title must be made up according to that law.(*i*)

141. The Manner in which Executors-Dative are Appointed.—The appointment is made in the order of legal preference already stated,(*j*) on a petition to the Sheriff of the county wherein the deceased died domiciled, or had his principal residence; and, in the case of persons dying domiciled furth of Scotland, or without any fixed or known domicile, having moveable estate in Scotland, to the Sheriff of the Lothians.(*k*) By the Sheriff-Court Act,(*l*) which came into operation on 1st Oct. 1876, the former Commissary Courts were abolished, and their whole powers and jurisdictions transferred to the Sheriff of each Court as the Commissary of such Commissariot, and the office of Commissary Clerk is also abolished in every case of a vacancy occurring after the date of the Act, except in the Commissariot of Edinburgh.

142. Suggestive Form of Petition.—

Unto the Honourable the Sheriff of the Lothians, the petition of A. B., grocer, 100 George Street, Edinburgh.

Humbly sheweth,

That the late C. D., who resided at No. 100 Grange Road, Edinburgh, died there on the 26th day of May, 1882, and had at the time of his death his ordinary or principal domicile in the County of Edinburgh (or "furth of Scotland," or "without any fixed domicile," or "without any known domicile," as the case may be).

That the petitioner is the eldest son and one of the next-of-kin of the said C. D.;

or,

That the petitioners are the only surviving sons and daughters, and thus representatives of [name], who was a son, and one of the next-of-kin of the said C. D;

(*g*) M'Laren, § 38; *Whiffen*, 12th June, 1872, 10 Macp. 797.

(*h*) *M'Cubbin*, 3rd Dec. 1859, 22 D. 164.

(*i*) *Monteith*, 28th June, 1882, 9 [R. 982.

(*j*) § 139.

(*k*) 21 & 22 Vict. c. 56, § 3.

(*l*) 39 & 40 Vict. c. 70, § 35.

or,

That the petitioners are the sole surviving children of [name], son, and one of the next-of-kin of the deceased C. D., who predeceased him;

or,

That the petitioner is the widow [or the mother—*if by the mother, it should be added that the deceased died without issue, predeceased by his father*] of the said C. D.;

or,

That the petitioner is a legatee of the said C. D., under his will dated 26th May, 1883, an extract of which is herewith produced.

May it therefore please your Lordships to decern the petitioner executor-dative *qua* one of the next-of-kin [or *qua* representative of one of the next-of-kin, or *qua* children of a predeceasing next-of-kin, or *qua* widow, *qua* mother, or otherwise, as the case may be], of the said C. D.

According to justice, &c.

(To be signed by the petitioner or his agent).

In the Sheriff-Court of Edinburgh all petitions for the appointment of executors-dative and other applications to the Court must be written on foolscap paper and enveloped in cartridge paper for better preservation.

143. Lodgment of Petitions.—In the said Court, all petitions for the appointment of executors-dative must be lodged, along with two copies, with the Commissary Clerk before one o'clock of the Friday preceding the publication thereof by the Keeper of the Record of Edictal Citations in terms of § 4 of 21 & 22 Vict. c. 56, and which takes place on Monday weekly. Any document founded on in the petition must be lodged at the same time, or before the petition is called. In the Inferior Sheriff-Court, the lodgment of petitions will depend on the time within which the Rolls of Petitions can be transmitted to the Keeper of the Record of Edictal Citations.

144. Intimation of Petition.—Upon the petition being presented to the Sheriff, signed by the petitioner or his agent, the Sheriff-clerk shall intimate it in the manner prescribed by § 4 of the Act 21 & 22 Vict. c. 56, and afterwards write a certificate thereon in terms of § 44 of the Sheriff-Court Act of

1876, that the same has been duly "intimated and published in terms of the Statute."

145. Decerniture on Petition.—On the expiration of nine days after the Sheriff-clerk shall have endorsed a certificate of publication on the petition, the petition may be called in Court, and, if there be no competing petition, the petitioner obtains what is termed a decree-dative, which is the technical name given to the sentence of the Judge conferring on the petitioner the office of executor, and is precisely equivalent to a nomination of an executor by the deceased himself.(*m*)

146. Publication of Confirmation.—It is the duty of the Commissary Clerk of Edinburgh to publish annually, on 31st December, a printed calendar of all confirmations and inventories passed in Scotland during the year preceding, specifying in each case the name of the deceased, date of death, amount of estate and other particulars, and such calendar may be inspected by the public on payment of a small fee in the office of every Sheriff-clerk in Scotland.(*n*)

147. Extract of Decree-Dative and its Effects.—Decrees-dative are extractable on the expiration of three lawful days after they have been pronounced. The decree enables the appointee as executor-dative to enter into possession of the deceased's moveable estate in order to exhibit upon oath, in the proper Sheriff-Court, an inventory of the deceased's moveable estate, as provided by the Revenue Acts.(*o*) But, to vest the estate contained in such inventory fully in the executor, and to give him a complete active title thereto,—*e.g.*, to enable him to compel payment of debts due to the deceased, or to compel persons in possession of moveables which belonged to the deceased to give up possession,—he must obtain what is technically termed a testament-dative or confirmation. He may, however, sue and be sued in any Court before obtaining confirmation, although he will require that title before he can enforce payment to him. He may raise the action upon an extract of the decree-dative.(*p*)

148. Procedure in Competition for Office of Executor.—Where a second petition is presented in reference to the same personal estate, intimation thereof must be given by the Sheriff-

(*m*) 21 & 22 Vict. c. 56, § 6.
(*n*) 39 & 40 Vict. c. 70, § 45.
(*o*) Ersk. 3, 9, 27.
(*p*) Ersk. 3, 9, 30.

clerk to the executors already decerned or confirmed to the deceased party.(*q*) In the Sheriff-Court of Edinburgh the Commissary-clerk requires (1), That in all cases where a second petition for confirmation is presented, the petitioner, or his agent, shall mark distinctly upon such petition the fact that it is a second petition; (2), That every such second petition shall contain, *inter alia*, a prayer for direction by the Sheriff of instant intimation to the party, or his known agent, who presented the first petition, and the Commissary-clerk shall immediately obtain, by interlocutor of the Sheriff, the said directions, viz.: — To intimate the presentation of the second petition by a full double of the said petition being left by an officer of Court in the hands of the said party, or his known agent, of which the said officer shall return an execution in due form, except where the said party, or his known agent, shall endorse on the said second petition an acknowledgment of the receipt of the said full double thereof, which shall be equivalent to an intimation executed as aforesaid; and (3), That three copies of the said second petition shall be lodged with the Commissary-clerk at the time of the presentation of, and in addition to, the said second petition itself.

GIVING UP INVENTORY OF THE PERSONAL ESTATE AND OBTAINING CONFIRMATION.

149. The Inventory.—The successor having obtained the title of decree-dative,(*r*) the next step is to make up an inventory of the deceased's personal estate,(*s*) and this should be done as soon as convenient after the funeral.(*t*) The inventory is a concise and particular description and estimate of the whole personal means and effects, wherever situated, which belonged to the deceased at the time of death. It must be lodged by the executors with the Sheriff-clerk upon foolscap paper duly stamped,(*u*) and must be sworn to as containing, to the best of his knowledge and belief, a true and perfect list of the deceased's effects.(*v*)

By recent Statutes, the mode of giving up inventories and expeding confirmations of personal estates not exceeding £300 in

(*q*) 39 & 40 Vict. c. 70, § 44.
(*r*) § 147.
(*s*) §§ 160, 161.
(*t*) § 151.
(*u*) § 156.
(*v*) §§ 164, 165.

gross value has been much simplified,(*w*) and provision has also been made for delivering certain special properties and interests in the form of an account.(*x*)

150. By whom must Inventory, &c., be given up.—The inventory must be given up by "all and every person or persons who, as executor or executors, or otherwise, shall enter upon the possession or management, in whole or in part, of any personal or moveable estate in Scotland of any deceased person." (*y*)

The accounts referred to in last section(*z*) must be delivered on oath by "every person who, as beneficiary, trustee, or otherwise, acquires possession or assumes the management of any personal or moveable property" of the description classified in the Customs and Inland Revenue Act, 1881.(*a*)

151. Within what Time must Inventory, &c., be given up.—The inventory must be given up before the executors dispose of or distribute any part of the estate, or uplift any part of the debts due to the deceased, and at the latest within six calendar months from the date of the deceased's death, or within two months after the determination of any suit or dispute respecting the succession which shall not be ended within four calendar months after the death of the deceased.(*b*)

The account must be delivered to the Commissioners of Inland Revenue upon the executor retaining the property therein for his own use, or upon his distributing or disposing thereof, and in any case within six calendar months after the death of the deceased.(*c*)

152. Where Inventory must be given up.—It must be given up and recorded in the Sheriff-Court of the County wherein the deceased died domiciled, and—in the case of persons dying domiciled furth of Scotland, or without any fixed or known domicile, having personal property in Scotland—the Sheriff-Court of Edinburgh.(*d*)

153. What Property must Inventory include.—It must include all the deceased's personal or moveable estate, wheresoever situated, and belonging or due to him beneficially at the time of death, then recovered or known to be existing,(*e*) but not any funds held by him in trust.(*f*)

(*w*) § 169.
(*x*) § 178.
(*y*) 48 Geo. III. c. 149, § 38; 39 & 40 Vict. c. 70.
(*z*) § 178.
(*a*) 44 Vict. c. 12. §§ 38, 39.
(*b*) 55 Geo. III. c. 184, § 37.
(*c*) 44 Vict. c. 12, § 39.
(*d*) 21 & 22 Vict. c. 56, §§ 3, 8; 39 & 40 Vict. c. 70, part 7.
(*e*) 48 Geo. III. c. 149, § 38.
(*f*) M'Laren, § 1693.

If the deceased die domiciled in Scotland, it may include any personal estate in England and Ireland. If English or Irish estate be included in the inventory, the fact that the deceased died domiciled in Scotland must be set forth in the affidavit to the inventory, and the English and Irish estate must be stated therein separately.(*g*)

In the case of rents, since the date of the Apportionment Act of 1870, there falls under executry a proportion of these from the term preceding the date of death to the date of death; and this includes the rents of lands, houses, quarries and minerals, also feuduties. Previous to the passing of the above Act, the rule was that if the deceased survived Whitsunday, one moiety of the rents of the crop of that year was personal estate, and, if he survived Martinmas, the whole rents of that crop fell into executry.

In the case of heritable securities in Scotland, these are made moveable, as regards succession in the creditors from and after 31st Dec. 1868,(*h*) and this whether the security shall have been granted before or after that date. Such securities include all securities over land, legal as well as voluntary, bonds of annualrent, and bonds of annuity, excepting securities by way of groundannual and absolute dispositions qualified by backbond.(*i*) Section 30 of 37 & 38 Vict. c. 94, seems to declare section 117 of 31 & 32 Vict. c. 101 applicable to real burdens on land. Real burdens upon land, therefore, should be included in the inventory of the personal estate. Such securities are still money secured on heritage, and, in so far as they may not come under the statutory provisions applicable to personal property, the Acts 23 Vict. c. 15, and 23 & 24 Vict. c. 80 will apply to them. The latter will still apply to heritable securities excluding executors, which are by the above section of 31 & 32 Vict. c. 101, to remain heritable, and also to personal bonds excluding executors, and heritable securities by absolute disposition qualified by backbond.(*j*)

Documents of the debts of foreign Governments and foreign companies which pass from hand to hand are property where the documents may be. Debentures or bonds by foreign companies and Governments, and the title to stocks of foreign companies and Governments in the possession of a party dying in Scotland, if they can be sold in the market, and the right of the purchaser com-

(*g*) 21 & 22 Vict. c. 56, §§ 9, 12, 13; 39 & 40 Vict. c. 70, § 41.
(*h*) 31 & 32 Vict. c. 101, § 117.
(*i*) 31 & 32 Vict. c. 101, § 3.
(*j*) 23 & 24 Vict. c. 80, § 3.

pleted to them in this country, are property situated in this country, and liable to inventory duty.

For probate and administration duty, debts and sums of money due from persons in the United Kingdom to a deceased on obligation or other specialty, shall be estate and effects of the deceased within the jurisdiction of Her Majesty's Court of Probate in England or Ireland, in which the same would be if they were debts upon simple contract, without regard to the place where the obligation or specialty shall be at the time of the death.(*k*)

Indian Government promissory notes and certificates issued, or stock created in lieu thereof, being assets of a deceased person, the interest whereon shall be payable in London, and which shall be registered in London, or enfaced in India for the purpose of such registration before the death of the owners; also Indian Government promissory notes, with coupons attached, in the same circumstances as to registration, and certificates issued, or stock created in lieu thereof, shall be personal estate, and *bona notabilia* in England of the deceased.(*l*)

Any ship, or any share of a ship, belonging to a deceased person, registered at any port in the United Kingdom, notwithstanding such ship at the time of the death may have been at sea, or elsewhere out of the United Kingdom, shall be deemed to have been at the time aforesaid in the port at which she may be registered, and liable to inventory, probate, or administration duty.(*m*)

Personal estate which a person, dying after 3rd April, 1860, shall have disposed of by will, under any authority enabling such person to dispose of the same as he shall think fit, shall be deemed personal or moveable estate of the person so dying, for the purpose of payment of inventory, probate, or administration duty.(*n*)

Donationes mortis causâ.

Property—beneficial interest accruing by survivorship; and

Property passing under voluntary settlement, interest for life or absolute power of revocation reserved to settlor,

particularly specified below,(*o*) require to be given up in an account in the form to be immediately noticed.(*p*)

(*k*) 25 Vict. c. 22, § 39.
(*l*) 23 Vict. c. 5, § 1.
(*m*) 27 & 28 Vict. c. 56.
(*n*) 23 Vict. c. 15, § 4. Inland Revenue Memorandum.
(*o*) § 178.
(*p*) § 179.

154. How Property in Inventory Valued.—The property in the inventory must be valued at the time when the inventory is sworn to, and the inventory must include the proceeds accrued on the property down to that time.(*q*) Any debt due to the deceased may be put in the inventory at its estimated value. The good should, however, be distinguished from the bad or irrecoverable debts; and household furniture and such like effects, unless of inconsiderable value, should be valued by a licensed appraiser, and the appraised value entered in the inventory.

155. What Debts may be Deducted from Inventory.—In the case of persons dying domiciled in the United Kingdom after 1st June, 1881, it is competent for the person exhibiting the inventory in Scotland to state in his affidavit the fact of such domicile, and to deliver therewith or annex thereto a schedule of the debts due from the deceased to persons resident in the United Kingdom, and the funeral expenses, and in that case for the purpose of the charge of duty on the inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule shall be deducted from the value of the estate and effects, as specified in the account delivered with or annexed to the affidavit, or whereof the inventory shall be exhibited. The debts to be so deducted shall be debts due and owing from the deceased and payable by law out of any part of the estate and effects comprised in the inventory, and shall not include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bona fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable, or a reimbursement may be capable of being claimed from any real estate of the deceased, or from any other estate or person. The funeral expenses to be so deducted shall include only such expenses as are allowable as reasonable funeral expenses according to law.(*r*)

156. Abstract of the Rates of Inventory Duty.—Inventories to be exhibited and recorded on or after 1st June, 1881.(*s*), (*t*)

(*q*) 23 & 24 Vict. c. 80, § 5.
(*r*) 44 Vict. c. 12, § 28.
(*s*) 44 Vict. c. 12.
(*t*) For duties previously payable, see 55 Geo. III. c. 184, Schedule, part 3; 22 & 23 Vict. c. 36, § 1; 27 & 28 Vict. c. 56, § 5; and 43 Vict. c. 14.

NOTE.—Additional inventory, where formerly duly stamped inventory exhibited and recorded prior to 1st June, 1881, to be charged with the stamp duty it would have been chargeable with, if 44 Vict. c. 12, had not been passed.

VALUE OF ESTATE.	DUTY.	VALUE OF ESTATE.	DUTY.
	£ s.		£ s.
Above £100 and not exceeding £150	3 0	Above £900 and not exceeding £950	23 15
150 ,, ,, 200	4 0	950 ,, ,, 1000	25 0
200 ,, ,, 250	5 0	1000 ,, ,, 1100	33 0
250 ,, ,, 300	6 0	1100 ,, ,, 1200	36 0
300 ,, ,, 350	7 0	1200 ,, ,, 1300	39 0
350 ,, ,, 400	8 0	1300 ,, ,, 1400	42 0
400 ,, ,, 450	9 0	1400 ,, ,, 1500	45 0
450 ,, ,, 500	10 0	1500 ,, ,, 1600	48 0
500 ,, ,, 550	13 15	1600 ,, ,, 1700	51 0
550 ,, ,, 600	15 0	1700 ,, ,, 1800	54 0
600 ,, ,, 650	16 5	1800 ,, ,, 1900	57 0
650 ,, ,, 700	17 10	1900 ,, ,, 2000	60 0
700 ,, ,, 750	18 15	and so on, at the rate of £3 for every	
750 ,, ,, 800	20 0	full sum of £100, and for any	
800 ,, ,, 850	21 5	fractional part of £100 over any	
850 ,, ,, 900	22 10	multiple of £100.	

157. Inventories exempt from Stamp Duty.—All estates of persons dying after 25th July, 1864, which shall not exceed in actual value £100,(*u*) and the estates of any soldier, seaman, or marine, slain or dying in the service of his country.(*v*) Also additional Inventories where the same shall not be liable to a duty of greater amount than the duty already paid upon the former Inventories of the same estates.(*w*)

158. Mode in which Inventory Duty Paid.—In the case of a person dying, having personal property in Scotland, England and Ireland, and also heritable securities and personal bonds excluding executors.

I.—Where deceased died domiciled in Scotland.

1. Duty in respect of the whole may be paid on the inventory required to be recorded in the Sheriff-Court; or,
2. Inventory duty may be paid (1) on the personal property situated in Scotland, including heritable securities made moveable as aforesaid,(*x*) and (2) on a "Special

(*u*) 27 & 28 Vict. c. 56, § 5; 44 Vict. c. 12, § 27.
(*v*) 55 Geo. III. c. 184.
(*w*) § 172.
(*x*) § 153; 31 & 32 Vict. c. 101, § 117.

Inventory" of the heritable securities excluding executors, personal bonds excluding executors, and heritable securities by absolute Disposition, qualified by back letter,(*y*) and probate or administration may be obtained in England and Ireland, in respect of the personal estate in these countries, and duty paid in respect of such on the affidavit in reference to these several instruments.

II.—Where deceased died domiciled furth of United Kingdom.

An inventory must be given up in Scotland, probate or administration taken out in England and Ireland, and duty paid in respect of the property in each country.(*z*)

159. Penalty for Neglecting to give up Inventory.—If any person required to exhibit an inventory, or to deliver an account, as already mentioned(*a*), refuse or neglect so to do within the prescribed time of six calender months after the death of the deceased, or shall knowingly omit any part of the deceased's property in such inventory or account, he shall be liable to pay double the amount of the duty chargeable; "and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy, or succession duties."(*b*)

160. Form of Inventory of Personal Estate—Debts not Deducted.—The Customs and Inland Revenue Act, 1881, provides that affidavits shall be in accordance with such form as may be prescribed by the Commissioners of Her Majesty's Treasury and supplied by the Commissioners of Inland Revenue. The form of inventory, where debts are not deducted, and where the deceased died domiciled in Scotland, provided by those commissioners, is as follows(*c*), (*d*) :—

(*y*) 23 & 24 Vict. c. 80, § 3.
(*z*) Inland Revenue Memorandum.
(*a*) § 151.
(*b*) 44 Vict. c. 12, § 40.
(*c*) 44 Vict. c. 12, § 29.
(*d*) 48 Geo. III. c. 149, § 38; 21 & 22 Vict. c. 56; 23 Vict. c. 15, and 23 & 24 Vict. c. 80; 31 & 32 Vict. c. 101, § 117; 39 & 40 Vict. c. 70, parts 7 & 8; 43 Vict. c. 14, part 3; 44 Vict. c. 12.

INVENTORY of the Personal Estate, *wheresoever situated* (and of the money secured by Scottish Heritable and Personal Bonds and other Instruments, excluding Executors), of (*name and description of deceased*), who died at on the day of 18 .

SCOTLAND.	£	s.	d.
I. PERSONAL PROPERTY.			
1. Cash in the house (*if deposited in Bank or invested, the proceeds to date of oath to Inventory to be given*) . . .			
2. Household furniture, silver plate, and other effects in the deceased's house—conform to appraisement—(*if sold or lent on hire, price with addition of interest or hire to be given as above*)			
3. Stock in trade and other effects belonging to deceased, conform to appraisement (*if sold off, price to be given with the addition of interest on it as above*) . . .			
4. Balance due to the deceased on an account current with the Bank . . .			
Interest thereon to date of oath to Inventory			
5. Debts due to the deceased upon the following documents—			
Personal Bond (*describe each Bond, and state interest as above*) . . .			
Heritable Bond (*describe each Bond, and state interest as above*)			
Bill (*describe each Bill, and state interest as above*)			
6. Book debts due to the deceased by the following parties (*name and address of the debtors and amount due by each to be given, but only the true value of the debt to be*			

	£	s.	d.
extended out so as to affect the duty. The debts which have been recovered should be stated at the amount recovered, and the interest of the money after it has been received to the date of the oath to the Inventory should be given) . . .			
N.B.—In all cases it is to be understood if the money realised is paid away in discharge of debts, no interest is to be given after it is so paid away.			
7. Rents of heritage due by the following tenants falling under executry (*describe them by the crop in the case of Land, and the period in the case of Houses*) . .			
8. Arrears of interest of money secured on heritable bonds excluding executors, and on heritage (other than on heritable bonds No. 5), by the following parties . .			
N.B.—The Act 33 & 34 Vict. c. 35, makes the interest executry to the date of death.			
9. Shares at £100 in the Edinburgh and Glasgow Railway. At the price of £ at date of oath to Inventory			
(*State Dividends accrued to date of oath to Inventory.*)			
10. Shares of £100 of the Bank of Scotland. At the price of £ at date of oath to Inventory			
(*Dividends as above.*)			
ENGLAND.			
1. Exchequer Bills, £ At the price of £ at date of oath to the Inventory			
2. East India Stock, £ (*Price as above.*)			
3. Three per cent. Consols, £ (*Price as above.*)			
(*Dividends accrued down to the date of the oath to the Inventory to be given.*)			

IRELAND.	£	s.	d.
1. Shares of the Bank of Ireland at £			
2. Shares at £50 in Midland Great Western Railway, Ireland, at the price of £ (*Price and dividends as above to be given.*)			
(See preceding Memorandum as to Estate in England or Ireland held in Trust.)			
Amount of Personal Estate . . £			
II. Money secured by Scottish Bonds excluding Executors, etc.			
1. Bond and disposition in security dated granted by in favour of the deceased excluding executors over lands in the county of (*if deceased acquired right by assignation, &c., describe title*)			
2. Interest thereon to date of oath to Inventory			
3. Bond (Personal), dated granted by in favour of the deceased, excluding executors (*if deceased's right is by assignation, &c., describe title*)			
4. Interest as above			
Total Amount of Personal Estate in the United Kingdom, and money secured on Heritage in Scotland, &c. . . . £			
ABROAD.			
Describe the Property and where locally situated.			
Note.—All Inventories to be written on foolscap paper.			

161. Form of Inventory of Personal Estate—Debts deducted.—The following is the form supplied by the Inland Revenue for cases where the deceased died domiciled in the United Kingdom, and deduction is taken of debts owing by him to persons in the United Kingdom and funeral expenses.

INVENTORY AS IN ABOVE FORM.

Gross Total Amount of Personal Estate in Scotland, England, and Ireland . . £

SCHEDULE OF DEBTS due and owing from the deceased at the time of his death to persons resident in the United Kingdom, and Funeral Expenses.(e)

I. DEBTS.	£	s.	d.
1. Robert Jennings, Wine Merchant . .			
2. John Smith, Grocer. . . .			
3. James Brown, Butcher . . .			
4. Thomas Jones, Baker . . .			
5. Charles Robertson, Draper . . .			
6. Edward Thomson, Doctor . . .			
7. Mary Dunlop, Servant . . .			
II. FUNERAL EXPENSES.			
John Croall & Son, Undertakers . .			
Cemetery Fees.			
TOTAL AMOUNT OF DEBTS AND FUNERAL EXPENSES. £			

ABSTRACT.

	£	s.	d.
Total Amount of Personal Estate, as per foregoing Inventory			
Amount of Debts and Funeral Expenses, as per Schedule			
Nett Value of Personal Estate chargeable with Duty . . . . £			

162. Inventory must be given up on Oath.—Along with the inventory there must be produced by the executor, beneficiary, trustee, or otherwise,(f) an oath or affirmation by him that the inventory contains a full and true statement of the deceased's whole personal estate and effects wherever situated, so far as known to him; and he must depone to the other particulars

(e) See § 155 as to debts deductible.

(f) § 150.

applicable to the individual case as mentioned in the appropriate form of oath prescribed by the Inland Revenue Commissioners.(*g*) The Commissioners of Inland Revenue may, at any time within three years from the recording of the inventory, call upon the executor to furnish explanations and to produce documentary or other evidence respecting any particulars in the inventory.(*h*)

163. Who may Administer Oath.—The oath or affirmation may be taken in Edinburgh either before the Sheriff or his substitute, or the Sheriff-Clerk or his depute, and, in those counties where the office of Commissary-Clerk still exists, before the Commissary-clerk or his depute, or before any commissioner appointed by the Sheriff, or before any Magistrate or Justice of the Peace within the United Kingdom or colonies, or any British Consul.(*i*)

In the case of accounts, any officer authorised by the Commissioners of Inland Revenue may administer the oath(*j*); and these Commissioners have lately authorised the distributors and subdistributors of stamps, and also certain officers of the Legacy and Succession Duties Department at Edinburgh to administer the oath.

The oath must be annexed to the inventory, and after using the proper *ad valorem* stamp of the inventory the additional matter may be written on plain paper.

164. Form of Oath,—Debts not Deducted, and Deceased Died Domiciled in Scotland.—

At , the day of One thousand eight hundred and In presence of Esq., Sheriff of the County of (or *Sheriff-Substitute, or the Sheriff or Commissary-Clerk or his Depute, or Commissioner appointed by the Sheriff, or any Magistrate or Justice of the Peace within the United Kingdom or the Colonies, or any British Consul*): APPEARED (*name and description*), executor of the deceased (*name and description*), who being solemnly sworn and examined, depones, That the said died at (where English or Irish estate is included in the Inventory, add *domiciled in Scotland*), upon the day of , and left a widow and lawful issue surviving (*or as the case may be*): That the deponent has entered upon the

(*g*) §§ 164, 165.

(*h*) 44 Vict. c. 12, § 37.

(*i*) 21 & 22 Vict. c. 56, § 11; 39 & 40 Vict. c. 70, part 7. As to oaths in case of estates under £300, see § 169.

(*j*) 44 Vict. c. 12, § 39.

possession and management of the deceased's estate as executor, nominated by him, along with (*design them*), and also along with (*design him*), now deceased (*or who declines to accept*), in a general disposition and deed of settlement, executed by him upon the day of , registered in the Books of Council and Session on the day of , an extract whereof (*N.B.*—The principal disposition and settlement may be produced though not registered) is now exhibited and signed by the deponent and the said , of this date, as relative hereto [or, *and the deponent has entered (or is about to enter) upon the possession and management of his personal or moveable estate, as executor-dative* qua *nearest in kin* (*or* qua *relict or* qua *creditor, &c.*), *or where there has been no appointment of Executor state the character in which the deponent represents the deceased*]: That the deponent does not know of any testamentary settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part thereof, other than the said [or, *that the deponent knows of no testamentary settlement or other writing left by the deceased relative to the disposal of his personal estate or effects, or any part thereof*]: That the foregoing Inventory, signed by the deponent and the said as relative hereto, is a full and complete Inventory of the personal estate and effects of the said deceased wheresoever situated, and belonging or due to him beneficially at the time of his death [*and money secured by Scottish Bonds or other Instruments excluding executors,*] in so far as the same has come to the deponent's knowledge [or, *that the deponent does not know of any money or property belonging to the deceased secured by Scottish Bonds or other Instruments excluding executors:* or, *that the money or property belonging to the deceased secured by Scottish Bonds or other Instruments excluding executors,*(*k*) *is not accounted for in this Inventory*]: That the said deceased had heritable estate in this country (*or the said deceased had no heritable estate in this country in so far as known to the deponent*): That the value at this date of the said personal estate and effects situated in Scotland (or, where English or Irish estate is included, *in the United Kingdom*) [*and of the said money* (*if any*)] including the proceeds accrued thereon down to this date, is pounds sterling, and does not exceed pounds sterling. (If confirmation be required, *That confirmation of the said personal estate is required in favour of the deponent and the said* .) (If confirmation be not required, *That confirmation is not at present required.*) All which is truth, as the deponent shall answer to God.

(*k*) See § 158 as to heritable securities.

165. Form of Oath,—Debts Deducted, and Deceased Died Domiciled in United Kingdom.

AT , the day of One thousand eight hundred and In presence of Esq., Sheriff of the County of (*or Sheriff-substitute, or the Sheriff or Commissary-clerk or his Depute, or Commissioner appointed by the Sheriff, or any Magistrate or Justice of the Peace within the United Kingdom or the Colonies, or any British Consul*): APPEARED (*name and description*), executor of the deceased (*name and description*), who being solemnly sworn and examined, depones, that the said died at domiciled at upon the day of , and left a widow and lawful issue surviving (*or as the case may be*): That the deponent has entered upon the possession and management of the deceased's estate as executor, nominated by him, along with (*design them*), and also along with (*design him*), now deceased (*or who declines to accept*), in a general disposition and deed of settlement, executed by him upon the day of , registered in the Books of Council and Session on the day of , an extract whereof (*N.B.*—The principal disposition and settlement may be produced though not registered) is now exhibited and signed by the deponent and the said of this date, as relative hereto [or, *and the deponent has entered* (*or is about to enter*) *upon the possession and management of his personal or moveable estate, as executor-dative* qua *nearest in kin* (*or* qua *relict or* qua *creditor, &c.*)]: That the deponent does not know of any testamentary settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part thereof, other than the said [or, *that the deponent knows of no testamentary settlement or other writing left by the deceased relative to the disposal of his personal estate or effects, or any part thereof*]: That the foregoing Inventory, signed by the deponent and the said as relative hereto, is a full and complete Inventory of the personal estate and effects of the said deceased wheresoever situated, and belonging or due to him beneficially at the time of his death [*and Money secured by Scottish Bonds or other Instruments, excluding executors*],(*l*) in so far as the same has come to the deponent's knowledge [or, *that the deponent does not know of any money or property belonging to the deceased secured by Scottish Bonds or other Instruments excluding executors,* or, *that the money or property belonging to the deceased secured by the Scottish Bonds or other*

(*l*) See § 158 as to heritable securities.

Instruments excluding executors is not accounted for in this Inventory]: That the said deceased was due and owing at the time of his death to persons resident in the United Kingdom, the debts enumerated in the foregoing Schedule: That these debts are payable by law out of the estate and effects comprised in the foregoing Inventory, are not nor any of them voluntary debts made payable on the death of the deceased, or voluntary debts payable under some instrument delivered to the donee thereof within three months before the death of the deceased, or debts which are primarily payable out of any real estate belonging to the deceased, or debts in respect whereof a reimbursement is capable of being reclaimed from any real estate of the deceased, or from any other estate or person whatsoever: That these debts, with the Funeral expenses of the said deceased, as also shown in the said Schedule, amount to pounds shillings and pence: That the nett value at this date of the said personal estate and effects situated in Scotland (or, where English or Irish estate is included, *in the United Kingdom*) [*and of the said money (if any)*] including the proceeds accrued thereon down to this date, and after deducting the amount of the said debts and Funeral expenses, is pounds sterling, and does not exceed pounds sterling. (If confirmation be required, *That confirmation of the said personal estate is required in favour of the deponent and the said*). (If confirmation be not required, *That confirmation is not at present required.*) All which is true, as the deponent shall answer to God.

166. Return of Inventory Duty on Account of Debts Paid. As already mentioned, the former Stamp Acts required a duty to be paid on the inventory of the whole succession at its gross value, without deduction on account of debts falling to be paid thereout.(*m*) It frequently happened, therefore, that the estate realised nothing like the amount included in the inventory; and the Act accordingly provided for the reduction of the duty to the amount corresponding to the nett value of the estate, provided the return of duty was claimed within three years from the time of recording the inventory, and that the debts were claimable by law out of the personal estate, and were then actually paid.(*n*) Where personal debts became chargeable on the heritable estate, a portion of the inventory duty paid in respect of money secured on heritage

(*m*) 55 Geo. III. c. 184, Sch. Part 3.

(*n*) 55 Geo. III. c. 184, § 51, and 5 & 6 Vict. c. 79, § 23.

was allowed.(*o*) But no return was granted in respect of voluntary debts due from a person dying after 28th June, 1861, expressed to be payable on the death of the deceased, or under any instrument which shall not have been *bona fide* delivered to the donee thereof three months before the death of such person.(*p*) The funeral expenses and those connected with the inventory were not allowed as deductions. If the estate could not be realised within three years, the time to apply for return of duty could be extended by the Inland Revenue Commissioners on application for that purpose.(*q*)

The necessity for this round-about way of adjusting the inventory accounts has now been removed by the Customs and Inland Revenue Act, 1881. That Act(*r*) allows to be deducted from the amount of the inventory "debts due and owing from the deceased, and payable by law out of any part of the estate and effects comprised in the affidavit or inventory, but are not to include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bona fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable, or a reimbursement may be capable of being claimed from any real estate of the deceased, or from any other estate or person;" the funeral expenses to be deducted under this power "include only such expenses as are allowable as reasonable funeral expenses according to law.(*s*).

167. Official Regulations.—The following regulations have been prescribed by the Inland Revenue Commissioners in regard to obtaining a return of the Stamp Duty on inventories exhibited after 31st August, 1815, on the ground of debts paid out of the estate :—

1. Application must be made by the claimant, in person or by his agent, at the Legacy Duty Office of Inland Revenue, Edinburgh, upon any Monday or Friday, but no return can be deemed to have been duly applied for unless the application is made by means of a *sworn* affidavit and schedule of debts, according to the next succeeding regulation, *within three years from the date of recording the Inventory* in the Books of the Sheriff or Commissary Court. If, however, the executor or legal representative shall be prevented from claiming a return of duty within

(*o*) 23 & 24 Vict. c. 80, §§ 4 & 6.
(*p*) 24 & 25 Vict. c. 92, § 3.
(*q*) 55 Geo. III. c. 184, § 51.
(*r*) 44 Vict. c. 12, § 28 ; not retrospective.
(*s*) 44 Vict. c. 12, § 28.

that period, application to the Commissioners of Inland Revenue, by letter addressed to Alfred Hanson, Esq., Inland Revenue, Somerset House, London, W.C., having the Legacy Duty Office reference on it, may be made, in the first instance, to grant further time, and this must be obtained before making the claim.

2. It is necessary to produce an affidavit of the executor or legal representative of the deceased, and a schedule of debts in respect of which the return of duty is claimed, according to the forms given therein and below(*a*), together with such valuations or appraisements as are referred to in the inventory.

3. Evidence must be given of the validity of the debts, and of their being payable by law, and paid out of the deceased's personal estate; and vouchers (on the proper stamps) of the payment thereof must be exhibited. The proper documents in respect of debts on bond, bill, or other security, are the several instruments (duly stamped) relating to such debts, with the proper discharges or other acknowledgments of the payment. If the debts are not secured by bonds, bills, or otherwise, the relative accounts, or other instructions, should be produced.

4. The affidavit may be made in *England* before a Commissioner appointed to administer oaths in the Supreme Court of Judicature in England, or at the Legacy Duty Office, Somerset House; or in *Scotland* before one of Her Majesty's Justices of the Peace. But unless made at the Legacy Duty Office, Somerset House, or before a Justice of the Peace in *Scotland*, such affidavit requires a 2s. 6d. stamp.

5. The affidavit is to be written on a sheet of *foolscap* paper, with a *quarter margin* on the left-hand side of each page. On the third page of the sheet, the amount or value of the deceased's estate is to be stated from the inventory exhibited in the proper Court, and any correction of the value may here be made, not inferring the alteration of the amount of Stamp Duty; and a schedule or list is to be given of the debts actually paid, in the form and manner set forth therein and below(*b*). It will also be proper to number the articles of the schedule, and to put corresponding numbers upon the vouchers.

6. If an additional inventory shall be requisite at the time of applying for a return of the duty, on the ground of debts, such additional inventory, duly stamped, should be exhibited in the proper Court. If, on the other hand, any effects shall have been overstated in the original inventory, so as to have occasioned the inadvertent payment of a higher rate of duty than that legally payable in

(*a*) § 168. | (*b*) pp. 187, 188.

reference to the true gross value of the estate, it will be competent to exhibit a new inventory in the Sheriff or Commissary Court, containing such gross value, and stamped in correspondence therewith; and thereafter to obtain allowance of the original inventory, as a spoiled stamp, provided such allowance shall be applied for within six calendar months from the date of the new inventory, and provided this shall have been exhibited before the obtaining of any return of the duty paid on the original inventory.

7. A return of duty cannot be granted on account of debts which are not actually paid, nor until the effects of the deceased be fully got in and converted into money, or the amount and value thereof shall be otherwise clearly ascertained, and the executor or legal representative enabled to render an account of the clear residue of the personal estate of the deceased, and pay the Legacy Duty thereon. To instruct that the Legacy Duty has been paid or that no Legacy Duty is due, the presenter of the claim must obtain a certificate thereon, by the proper officer, to that effect. The return of the Stamp Duty upon an inventory is restricted to the debts actually contracted, and due and owing by the deceased at the time of his death, and payable by law out of his personal estate; and no return can be granted, in respect of debts, with reference to any inventory dated prior to the 1st September, 1815.

8. All the personal effects of a deceased person are liable to the payment of his personal debts. When Probate or Administration Duty has been paid in respect of the personal estate in England and Ireland, an apportionment of the debts is necessary. In that case merely the amount of debts corresponding to the proportion which the Scotch effects bear to the estate in England and Ireland of the deceased, will be deducted from the amount of the debts described in the schedule, for ascertaining the return of Inventory Duty which is legally claimable. And for facilitating such an apportionment, it will be necessary to notice the estate in England and Ireland, if there be such, and to specify the amount or value in the Schedule No. 2, which is suggested in the annexed form (page 188), but which will not be requisite if the personal effects of the deceased are entirely situated in Scotland. Neither will it be necessary when the inventory shall embrace the whole effects of the deceased in Great Britain and Ireland, and bear a corresponding amount of duty, in terms of the Act 21 & 22 Vict. cap. 56.

9. With reference to such proportion of the debts as may, in the result of an apportionment, be ascertained to correspond to the particular amount of any effects of the deceased, in respect of which his will has been proved or letters of administration granted in

England or in Ireland, a distinct application for a corresponding return of the Probate or Administration Duty may be made at the Legacy Duty Office, Somerset House, or in Dublin, according to the forms there recognised. But the production of vouchers of the debts at that Office may be occasionally rendered unnecessary by a certificate of their correctness from the Office at Edinburgh.

10. In all cases in which a less sum than the full amount of the debt due shall have been paid, such smaller sum must be inserted in the schedule, that being the sum actually paid; and this latter sum must appear in the body of the affidavit.

11. When the claim shall have been examined and ascertained to be in all respects correct, the vouchers will be returned to the parties. The Comptroller of Inland Revenue will subsequently notify the result; and a Return of Duty (if authorised) will be thereupon obtained, all Legacy and Succession duty then due having first been paid.

12. If, in the affidavit, the deponent should pray to have the duty to be returned paid to his *agent*, the agent's receipt for the same will be a sufficient discharge.

13. The Superintendent of Legacy and Succession duties at Edinburgh is instructed and authorised to call for such explanations from any claimant for a return of duty, or from the agent of such claimant, in the form of an affidavit of verity or of credulity, or otherwise, as may be considered requisite under the particular circumstances of the relative claim, but he is not at liberty to dispense with a particular observance of these regulations.

168. Form of Affidavit for Return of Duty.—The following is the form issued by the Inland Revenue:—

To be filled in from the Circular Letter Issued by the Legacy Duty Department.	*Register* *No.* 18 *Fol.*	This Reference must be written on the Back also of the Affidavit.

The several sums must be expressed throughout the Affidavit IN WORDS AT LENGTH, instead of being denoted by FIGURES.

AT upon the day of One Thousand Eight Hundred and , in the presence of C. D., one of Her Majesty's Justices of the Peace for , appeared A. B. (*design him*), the executor-*testamentary* (or *dative*) of E. F., late , who died on the day of , One Thousand Eight Hundred and ; and being solemnly sworn and examined, depones, That the said deponent did exhibit, in the Sheriff or Commissary Court of , a full and complete inventory (see Note D *so far as then known*), duly stamped, in terms of law, of all the personal estate and effects of the said deceased E. F.; and particularly all the property over which the deceased had

a general power of appointment (see Note F) wherever situated, and therein described as amounting, so far as situated in Scotland (see Note E below) to the sum of and on which Inventory was paid a stamp duty of (see Note D below), and depones, That such personal estate and effects are now fully got in (or, *the amount or value of such personal estate and effects is now clearly ascertained*); and that the gross amount or produce (or *value*) thereof does not exceed the *said* sum of (see Note A below), according to the best of the knowledge, information, and belief of this deponent: Depones, That the said deceased did not, to the best of the deponent's knowledge and belief, die possessed of any other personal estate or effects whatever in Great Britain or Ireland (see Note B below): [UNLESS OF THE EFFECTS SITUATED IN ENGLAND AND IRELAND, AMOUNTING TO WHICH ARE SET FORTH IN THE SCHEDULE No. 2, HEREUNTO ANNEXED, AND SIGNED BY THE DEPONENT]: And depones, That the deponent has actually paid debts (see Note C below) of the full amount of due and owing from the deceased at the time of his death and payable by law out of his personal estate, according to the schedule thereof hereunto annexed, and signed by the deponent, without reckoning or including any interest accrued or become due upon any debt since the deceased's death (see Note B below, above referred to): [AND DEPONES, THAT UPON A RATEABLE APPORTIONMENT OF THE AMOUNT OF THE SAID DEBTS BETWEEN THE PERSONAL EFFECTS OF THE DECEASED IN SCOTLAND AND THOSE SPECIFIED IN THE SAID SCHEDULE, MARKED No. 2 RESPECTIVELY, THE PROPORTION THEREOF LIABLE TO BE ALLOCATED ON THE EFFECTS WITHIN SCOTLAND APPEARS TO BE and that this sum being deducted from the amount or value of the said personal estate and effects of the deceased (see Note B) [IN SCOTLAND], doth reduce the same to a balance of ; which, if it had been the whole gross amount or value of the said personal estate and effects of the deceased, would have occasioned a less Stamp Duty to be paid on the said Inventory than was actually paid thereon by the sum of , as this deponent has been informed and believes: And farther depones, That relief or reimbursement of the debts specified in the aforesaid schedule, or of any part or parts thereof, has not been obtained, and is not due or claimable, from any real estate of the said deceased, or from any other estate distinct from the said personal estate, or from any person or persons whatever. All which is truth, as this deponent shall answer to God; and is now submitted to the Commissioners of Inland Revenue, praying that the said sum of may be returned to this deponent, pursuant to the Act of Parliament in that

*** OBSERVE.—Although the Estate may be Insolvent, a larger sum must not be inserted for Debts than will remain after deducting from the gross amount of the Property, the Funeral and Testamentary or Executorship expenses, less the Duty claimed to be returned.

behalf; and that the same may be paid to , the agent for this deponent, whose receipt shall be a sufficient discharge therefor.

NOTE.

(A) If this is different from the original total of the Inventory, add, omitting the word "said," "as appears from the explanatory state- "ment contained in the introduction to the Schedule hereunto "annexed." But if the actual gross amount shall be such as to infer a higher rate of duty than that paid on the Inventory; or if any effects shall have been overstated, so as to have occasioned the inadvertent payment of a higher rate of duty than that payable in reference to the true gross value of the estate; then, in the former case, an additional Inventory should, and in the latter case, a new Inventory must, precede the claim of return.

(B) If the deceased did die possessed of any other property in Great Britain or Ireland, insert those relative words which are placed within brackets, and in a different type, with such alterations or additions as the case may require. (*See the 8th Regulation.*)

(C) If the executor has retained any debt due to himself (or *herself*), omit "has actually paid debts," and say, "is entitled to retain, and "has retained, the sum of being a debt due and owing "to himself (or *herself*), and has actually paid the other debts men- "tioned in the Schedule hereunto annexed; the whole debts so "retained and paid being"

If the estate be insolvent, the amount of the funeral and testamentary expenses must be set forth separately, below the Schedule of Debts.

Should the Representatives, in consequence of taking the Real Estate, or from any other cause, choose not to compound with the Creditors, but to make good the deficiency out of their own funds, then only such of the Debts as shall be paid out of the deceased's assets are to be inserted in the Schedule.

(D) When there is an additional Inventory, put in the words in *Italics* here, and insert after the amount of Stamp Duty paid on the original Inventory, "and an additional Inventory, being a full and complete Inventory of the said estate and effects, amounting to "£ and on which was paid a Stamp Duty of £ , "making the total duty £ "

(E) Add, if the fact be so, England and Ireland.

(F) If no property over which the deceased had a power of appointment, omit the clause and insert "and that the said deceased had not a general power of appointment over any property."

SCHEDULE No. 1.

FORM OF ACCOUNT.

SOLVENT ESTATE.

THE TOTAL AMOUNT of the Inventory of the Personal Estate and Effects of the late E. F., recorded in the Sheriff or Commissary Court Books of on the £22,950 0 0

* *Schedule of Debts due and owing from the Deceased at the time of his Death and actually Paid.*

No.				
1.	Robert Jennings, Wine Merchant	£170	0	0
2.	John Radcliff, Upholsterer .	235	19	0
3.	Richard Rolfe, Butcher . .	43	19	0
4.	Chas. Lewishman, Tailor . .	105	0	0
5.	Messrs. Barber & Co., for Manchester Goods .	1500	10	0
6.	Messrs. Inglis&Co., for Calicoes .	810	9	0
7.	Messrs. Rumbold, for Irish Linens	432	10	0
8.	John Richards, for Fustians . .	133	15	0
9.	Thomas Rowlandson, on Bond for Money Lent, £7000, with £337, 19s. 6d. interest due at the Death of the Deceased . .	7337	19	6
10.	Messrs. Vigures' Note of Hand for Stationery .	278	10	6
			11,048	12 0
	BALANCE .		£11,901	8 0

NOTE. — The Inventory Duty on this Balance, the same being under £12,000, is £200, which being deducted from £350 (the Duty paid on the Gross Value), leaves £150 to be returned.

(Signed) A. B.
Executor.

If the Deceased shall have died possessed of other Personal Estate in England, Ireland, or elsewhere out of Scotland, it will be necessary to modify the conclusions of the preceding

FORM OF ACCOUNT.

INSOLVENT ESTATE.

THE TOTAL AMOUNT of the Inventory of the Personal Estate and Effects of the late E. F., recorded in the Sheriff or Commissary Court Books of on the £19,950 0 0

* *Schedule of Debts due and owing from the Deceased at the time of his Death and actually Paid.*

No.				
1.	Robert Jennings, Wine Merchant	£170	0	0
2.	John Radcliff, Upholsterer .	235	19	0
3.	Richard Rolfe, Butcher . .	43	19	0
4.	Chas. Lewishman, Tailor . .	105	0	0
5.	Messrs. Barber & Co., for Manchester Goods .	2700	10	0
6.	Messrs. Inglis&Co., for Calicoes .	1810	9	0
7.	Messrs. Rumbold, for Irish Linens	1432	10	0
8.	John Richards, for Fustians and other Goods .	2133	15	0
9.	Messrs. King & Son, for Plate	137	19	6
10.	Messrs. Vigures' Note of Hand for Stationery .	278	2	4
11.	Messrs. Cuthbert, for Manchester Goods . .	5545	2	10
12.	Thomas Rowlandson, on Bond for Money lent .	4000	0	0
13.	James Shrubshole, on Bond, ditto .	3500	0	0
14.	Richard Soly, on Bond, ditto .	1500	0	0
15.	John Purvis, Note of Hand .	1000	0	0
	TOTAL DEBTS	£24,593	6	8

But the Personal Estate sufficient to pay only 19,440 0 0

The Amount of the Funeral and Testamentary Expenses (less the Duty to be returned) being £510 0 0

(Signed) A. B.
Executor.

SCHEDULE No. 1—*continued.*

Brought forward.		£11,901 8 0
Schedule by stating the Sum of the Debts (viz.—£11,048, 12s.) in the inner column, and drawing out only a proportion thereof, corresponding to the Effects situated in Scotland, thus—		
TOTAL DEBTS, £11,048 12 0		
But (as the effects situated elsewhere amount to £24,855 as in the Schedule, No. 2, below) the proportion of the Debts corresponding to the Effects situated in Scotland is merely	5304 3 2½	
BALANCE .		£17,645 16 9½

NOTE.—The Inventory Duty on this Balance, the same being under £18,000, is £280; which being deducted from £350 (the Duty paid on the Gross Value), leaves £70 to be returned.

(Signed) A. B.
Executor.

Funeral and Testamentary Expenses.

John Crisloe, Undertaker, for Funeral		£100 0 0
James Shanks, W.S., Business Account . .	£659 0 0	
Deduct Duty to be returned .	299 0 0	360 0 0
John Purvis, Factor . . .		50 0 0
		£510 0 0

(Signed) A. B.
Executor.

* Any Correction of the Total, in correspondence with Note A at the foot of the second page, should be concisely introduced here. Should the Debts be too numerous for one sheet of foolscap, an additional sheet or sheets may be annexed.

SCHEDULE No. 2.

PERSONAL ESTATE AND EFFECTS NOT INCLUDED IN SCHEDULE NO. 1.

Here state the effects situated in England and Ireland agreeably to the 8th Regulation.

£	
.. .. ..	
£24,855	0 0

169. Inventories of Personal Estates not exceeding £300.—Two recent Statutes have conferred important privileges in respect of inventories and confirmations of Intestate Estates where the gross amount of the personal estate does not exceed £300.

The first Act(*t*) which came into operation and took effect as from 19th July, 1875, provides that where

(*t*) 38 & 39 Vict. c. 41. This Act applies to intestate estates. An Act was subsequently passed applicable to testate estates—viz., 39 & 40 Vict. c. 24.

(1.) The deceased died domiciled in Scotland;
(2.) The estate does not exceed £150; and
(3.) The applicant is widow, or child, or children of the intestate, or child or children of an intestate's widow;

the applicant may, instead of presenting a petition to the Sheriff for the appointment of an executor and going through the customary formalities for obtaining confirmation, at once apply to the Sheriff-clerk of the county within which the deceased was domiciled at the time of his death, to prepare an inventory and relative oath, and such clerk shall administer the oath; and on caution being found by the applicant, the clerk will record the inventory and expede the confirmation, for fees which shall not exceed the following:—Where the estate does not exceed £20, the sum of 5s.; and where it exceeds £20, the sum of 5s., and a further sum of 1s. for every £10 or fraction of £10 exceeding the £20.

If the confirmation contain English or Irish property, it may be sealed in English or Irish Courts for 2s. 6d.

The clerk may refuse to proceed if not satisfied that the estate does not exceed £150; and he may require proof of the identity and relationship of the applicant.

The powers and jurisdictions of all the Commissary Courts, were by the Sheriff Courts Act, 1876,(*u*) transferred to the Sheriffs of the respective counties; and all appointments of Commissary-clerk, except in Edinburgh, were thereby to be abolished on vacancies occurring.

The second Act(*v*) extends the provisions of the first Act in the case of persons dying after 1st June, 1881, (1) where the estate does not exceed £300 without any deduction for debts or funeral expenses; (2) whoever may be the applicant for representation; and (3) wheresoever the deceased may have been domiciled at the time of death. It also provides that the above fees, inclusive of 2s. 6d. to the Commissary or Sheriff-clerk, shall not exceed 15s.

170. Form of Inventory not exceeding £300, and of Relative Oath.—The following are the forms supplied by the Inland Revenue Commissioners as meeting the requirements of the above Acts:—

(*u*) 39 & 40 Vict. c. 70, §§ 35, 37. | (*v*) 44 Vict. c. 12, §§ 33, 34.

Inventory of the Personal Estate, wheresoever situated, of [*name and description of deceased*], who died at on the day of 18 .

SCOTLAND.	£	*s.*	*d.*
1. Cash in the house			
2. Household furniture and other effects in the deceased's house			
3. Stock in trade and other effects belonging to deceased			
4. Sum in bank; viz. [*specify it, with interest thereon to date of oath to Inventory*]			
[*Add any other estate in the usual form.*]			

At , the day of one thousand eight hundred and , In presence of : Appeared (*name and description of applicant*) who being solemnly sworn and examined, depones, That the said (*name and description of the deceased*) died at on the day of one thousand eight hundred and and had at the time of his [or her] death his [*or her*] ordinary or principal domicile in : That the deponent is the executor of the said deceased, and has entered upon the possession and management of his [*or her*] estate as executor nominated by him [*or her*] *along with* in his [or her] will [*or other testamentary settlement or writing*] dated the day of eighteen hundred and and now exhibited and signed by the deponent, and the said as relative hereto, (or, *that the deponent is the widow or son or daughter, or next of kin, or as the case may be*) of the said deceased, and is desirous to enter upon the possession and management of the deceased's estate: That the deponent does not know of any other will or testamentary settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part thereof (or, *that the deponent does not know of any testamentary settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part thereof*): That the foregoing inventory, signed by the deponent and the said as relative thereto, is a full and complete inventory of the personal estate and effects of the said deceased wheresoever situated, and belonging or due to him [*or her*] beneficially at the time of his [*or her*] death, in so far as the same has come to the deponent's knowledge: That the said deceased had heritable estate in this country (*or the said deceased had no heritable estate in this country in so far as known to the deponent*): That the value at this date of the said personal estate and effects, including the proceeds accrued thereon down to this date, does not exceed three hundred pounds sterling: That confirmation of the said

personal estate in Scotland [*England and Ireland, as the case may be*] is required in favour of the deponent.—All which is truth, as the deponent shall answer to God.

171. Duty on Inventories not exceeding £300.—No duty is chargeable on estates under £100 ; and where the estate exceeds this sum and does not exceed £300, the duty is 30s. The payment of this duty relieves from legacy or succession duty.(*w*)

If it should be discovered after the inventory has been given up that the value of the estate exceeded £300, "then a sum equal to the stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to Her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief afforded from legacy or succession duty be claimed or allowed by reason of the deposit or payment of any sum."(*x*)

172. Giving up Additional Inventory.—If at any subsequent period in the management of the executry, other property belonging to the deceased is discovered, inferring payment of further duty, the Revenue Statutes require that the executor shall, within two calendar months after such discovery, exhibit upon oath an Additional Inventory specifying such property, and specifying also the amount or value of the estate and effects of the same person comprised in the former Inventory.(*y*) The property in the Additional Inventory must also be sworn to according to the value at the date when the Inventory is given up, including the proceeds that have accrued thereon. It is sufficient that the stamp duty paid on the original and additional Inventory be of the amount corresponding to the total estate.(*z*) If the total estate, original and additional, would not have required a larger stamp than that originally paid, the additional may be given upon unstamped foolscap paper.(*a*) If the original inventory has been recorded before 1st June, 1881, the stamp duty to which it is liable is the stamp duty exigible previous to the Act of that year.(*b*)

173. Form of Additional Inventory.—The following is the form prescribed by the Inland Revenue Office :—

(*w*) 44 Vict. c. 12, § 36.
(*x*) 44 Vict. c. 12, § 35.
(*y*) 48 Geo. III. c. 149, §§ 38, 40.
(*z*) 16 & 17 Vict. c. 59, § 8.
(*a*) 55 Geo. III. c. 184 ; Bell's Lect. 1040.
(*b*) 44 Vict. c. 12, § 27.

Additional Inventory of the Personal Estate, wheresoever situated (and of Money secured on Heritable Property in Scotland, and of Money secured by Scotch Bonds, &c., excluding executors), of [*name and designation of the deceased*], who died at upon the day of 18 .

		£	s.	d.
	Amount of the Estate given up in the Inventory recorded in the Sheriff or Commissary Court Books of on the day of 18 .			
	SCOTLAND.			
I.	EFFECTS UNDERVALUED.			
	1. Value of the Stock of Wood given up in the Inventory . *Item* No. at . Produced when sold . .	£ s. d.		
	Difference			
	Interest and proceeds on ditto to date of oath to this Additional Inventory . .			
	2. Debt due on Open Account by valued in the Original Inventory . *Item* No. at . But the Debt has been recovered in full . . .	£ s. d.		
	Difference			
	Interest and proceeds on ditto to date of oath to this Additional Inventory . .			
II.	EFFECTS OMITTED.			
	1. Debts amounting to £ ranked on the Trust-Estate of upon which a final Dividend has been declared of per pound . . .			
	Interest and proceeds to date of oath to this Additional Inventory . . .			
	Note.—The deceased's books did not show the existence of this debt, and the claim was not discovered until after the Inventory was recorded.			
	£			
	Note. — Inventory Duty on the total Personal Estate in England, Scotland, and Ireland, and Money secured on Heritage in Scotland, is £			
	The Duty paid on the former Inventory .			
	The Duty on the Additional Inventory .			

174. Form of Oath to Additional Inventory.—The following is the form prescribed by the Inland Revenue Office :—

At the day of
One thousand eight hundred and

In presence of (*c*)

Appeared (*name and designation*), one of the executors nominated by the said deceased (or executor-dative *qua* of the deceased), who being solemnly sworn and examined, depones, That the foregoing is an additional inventory of the personal estate of the said deceased, as ascertained and discovered since the day of when the original inventory of the deceased's estate was recorded in the books of the Commissary Court of the Commissariot of That the deponent has not discovered any other estate or effects belonging to the deceased. That the said inventory, which is signed as relative hereto, is a full and true inventory of all the personal or moveable estate or effects of the said deceased wheresoever situated, already recovered, or known to be existing, belonging or due to him beneficially at the time of his death [*and of all the money secured on heritage in Scotland,*(*d*) *and money secured on Scottish bonds, excluding executors, and money secured on Scottish bonds or other instruments, the rights to which have been taken excluding executors, belonging to the deceased, liable to the duty imposed by the Acts* 23 *Vict. c.* 15, *and* 23 & 24 *Vict. c.* 80], in so far as the same has come to the deponent's knowledge [*or that the deponent does not know of any money or property belonging to the deceased liable to the duty imposed by the Acts* 23 *Vict. c.* 15, *and* 23 & 24 *Vict. c.* 80—*or that the money or property belonging to the deceased liable to the duty imposed by the Acts* 23 *Vict. c.* 15, *and* 23 *and* 24 *Vict. c.* 80, *is not accounted for in this inventory*]. That the value at this date of the said personal estate and effects situated in the United Kingdom [*and of the said money*] *including the proceeds accrued on the additional property given up in this inventory down to this date* is . . pounds sterling, and under pounds sterling. (If confirmation shall be required, *That confirmation of the said personal estate given up in this additional inventory, which amounts, with the proceeds accrued thereon down to this date, to pounds sterling, and under pounds sterling, is required in favour of* .) All which is truth, as the deponent shall answer to God.

(*c*) See § 163 for persons before whom oath may be taken.

(*d*) See § 158 as to heritable securities.

175. Giving up a Corrective Inventory.—If the estate as given up in the original inventory has been over-estimated, or if certain property has been improperly included in it, a corrective inventory should be exhibited upon oath in the Sheriff Court, setting forth the ascertained value of the property, and engrossed on a stamp corresponding to such ascertained value. The duty on the original inventory will be allowed on affidavit as a spoiled stamp, if lodged within six months from the recording of the corrective inventory.(*e*)

176. Form of Corrective Inventory.—The following is the form prescribed by the Inland Revenue Commissioners :—

Corrective Inventory of the Personal Estate, wheresoever situated (and of Money secured on Heritable Property in Scotland,(*f*) and of Money secured by Scotch Bonds &c., excluding executors), of (*name and designation of the deceased*), who died at upon the day of 18 .

	£	s.	d.
Amount of the Estate given up in the Inventory recorded in the Commissary Court Books of on the day of 18			

SCOTLAND.

Effects over-estimated.

	£	s.	d.	£	s.	d.
Book Debts owing to the Deceased . .						
Among those debts was included, C. D., £200. . .						
This debt was found to have been paid before the Deceased's death, therefore deduct . . .				200	0	0
Actual Value of Estate . £						

177. Form of Oath to Corrective Inventory.—The form used in this is, with the exception of a slight alteration, the same as that used in exhibiting an additional inventory. It runs as follows :—

. *At the . day of*
One thousand eight hundred and

In presence of (*g*)

(*e*) 16 & 17 Vict. c. 59, § 8.
(*f*) See § 158 as to heritable securities.
(*g*) See § 163.

Appeared (*name and designation*) one of the executors nominated by the said deceased (or executor-dative *qua* of the deceased), who, being solemnly sworn and examined, depones, That the foregoing is a corrective inventory of the personal estate of the said deceased, as ascertained and discovered since the day of when the original inventory of the deceased's estate was recorded in the books of the Commissary Court of the Commissariot of That the deponent has not discovered any other estate or effects belonging to the deceased. That the said inventory, which is signed as relative hereto, is a full and true inventory of all the personal or moveable estate or effects of the said deceased wheresoever situated, already recovered, or known to be existing, belonging or due to him beneficially at the time of his death [*and of all the money secured on heritage in Scotland, and money secured on Scottish bonds, excluding executors, and money secured on Scottish bonds or other instruments, the rights to which have been taken excluding executors, belonging to the deceased, liable to the duty imposed by the Acts* 23 *Vict. c.* 15, *and* 23 & 24 *Vict. c.* 80], in so far as the same has come to the deponent's knowledge [*or that the deponent does not know of any money or property belonging to the deceased liable to the duty imposed by the Acts* 23 *Vict. c.* 15, & 23 *and* 24 *Vict. c.* 80—*or that the money or property belonging to the deceased liable to the duty imposed by the Acts* 23 *Vict. c.* 15, *and* 23 & 24 *Vict. c.* 80, *is not accounted for in this inventory*]. That the value at this date of the said personal estate and effects situated in the United Kingdom [*and of the said money*], is pounds sterling, and under pounds sterling. All which is truth, as the deponent shall answer to God.

178. What Property must be given up in an Account.—The recent Customs and Inland Revenue Act(*h*) provides that all personal or moveable property of the following descriptions shall be included and delivered in an account, viz.—

"(1) Any property taken as a *donatio mortis causâ* made by any person dying on or after the first day of June, one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift, *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made three months before the death of the deceased.

(*h*) 44 Vict. c. 12, § 38.

"(2) Any property which a person dying on or after such day, having been absolutely entitled thereto, has voluntarily caused, or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

"(3) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

Or shortly (1) *donationes mortis causâ;* (2) property where beneficial interest accrues by survivorship; and (3) property passing under a voluntary settlement, interest for life reserved to settlor.

It would seem that every person taking benefit under the above provision is individually responsible for the preparation of the account and the payment of the duty thereon.

179. Form of Account.—The following is the form prescribed by the Inland Revenue Commissioners:—

Account of personal or moveable property which the deceased (*name and description*), who died at on the day of one thousand eight hundred and , made over as a *donatio mortis causâ*, or which he voluntarily caused to be vested in himself, and (*describe him*) who has succeeded thereto by survivorship on the deceased's death, or which he voluntarily settled by an instrument not being a will, whereby an interest for life or any period determinable by reference to death was reserved, either expressly or by implication to him, the settlor, or whereby he, the settlor, reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property.

	£	s.	d.
1. Sum of £ given to (*name and description*) by the deceased, about the day of one thousand eight hundred and , and now contained in Deposit Receipt with the Bank, at , in name of . . Interest thereon to the date of the oath .			
2. Sum due under Mortgage of the Clyde Navigation Trustees, dated , in favour of and and survivor . . . . . Interest thereon to the date of the oath .			
3. Sum contained in Bond and Disposition in Security over subjects at dated by in favour of and and held by them as trustees under trust, constituted by the deceased, and of which the deceased had the liferent (*insert the names and the relationship of the beneficiaries to the settlor and state shortly the terms of the trust*) . . . . . Interest thereon to the date of the oath .			
Total . . . . £			

180. Form of Oath to Account.—

At , the day of One thousand eight hundred and In presence of , an officer authorised by the Commissioners of Inland Revenue to administer oaths to accounts of property liable to the like duties as Inventories: Appeared , who, being solemnly sworn and examined, depones that the said (*name and describe the deceased*), died at on the day of One thousand eight hundred and : That the deponent believes the foregoing account is a full, true, and complete account of all the personal and moveable estate flowing from or derived from the said deceased coming under the following descriptions—(*a*) Property taken as a *donatio mortis causâ* made by the said deceased or taken under a voluntary disposition made by him, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which was not *bonâ fide*, made three months before the death of the deceased. (*b*) Property which the said deceased having been absolutely entitled thereto, has voluntarily caused to be transferred to or vested in himself and any other

person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof passed or accrued by survivorship on his death to such other person. (*c*) Property passing under a voluntary settlement made by the said deceased, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death, was reserved either expressly or by implication to him, the settlor, or whereby he, the said settlor, may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property. That the value, at this date, of the whole of the said moveable and personal estate, including proceeds accrued thereon down to this date, is pounds sterling, and does not exceed pounds sterling. All which is truth, as the deponent shall answer to God.

181. Rates of Duty on Account.—These rates are the same as those charged on inventories,(*i*) and "shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof." But "where an account delivered duly stamped comprises property passing under a voluntary settlement, and, upon the production of the settlement, it shall appear that the stamp duty of 5s. per centum has been paid thereon according to the amount or value of the property so passing, or any part thereof, the amount of such stamp duty shall be returned to the person delivering the account."(*j*)

182. Caution to be Found by Executors-Dative.—The office of executor-dative being in effect a trust for others, the person appointed is required, before being confirmed in the title,(*k*) to find caution to the satisfaction of the Sheriff for the faithful discharge of his duties.(*l*) The caution is usually fixed at the amount of the inventory; but on special application the Sheriff may, after public advertisement, restrict it to a smaller amount.(*m*) A woman has been refused as cautioner.(*n*) After the executor has entered upon the management of the estate the cautioner will not be relieved of his obligation as to future management without showing mal-administration, or that the executor is *vergens ad inopiam*.(*o*) Where a cautioner dies, his representatives are liable in his stead.(*p*) Cautioners are only liable for

(*i*) See § 156.
(*j*) 44 Vict. c. 12, § 38.
(*k*) See § 188.
(*l*) 4 Geo. IV. c. 98, § 2, App.
(*m*) § 185.
(*n*) *French*, 16th May, 1871, 9 M. 741.
(*o*) Bell's Prin. § 1899.
(*p*) *Monro*, 26th Feb. 1829, 7 S. 476.

the amount of the sum confirmed, and that it be applied to the purposes of the executry.(*q*) They do not warrant the *right* of the executor to the sum confirmed; and so, if a sum be confirmed by mistake of the executor, the cautioner is not liable, although the money be uplifted and lost by the executor.(*r*) It is competent to sue an executor without calling the cautioner, and the latter cannot object to the decree except by reduction.(*s*) Where a cautioner is bound conjunctly and severally with the executor, or renounces the benefit of discussion, he is directly liable to the creditor.(*t*) Where two or more are bound conjunctly and severally, each is liable to the creditor for the whole estate confirmed; but where not so bound, but simply as cautioners, each is liable only for his own share, unless some be insolvent, when the obligation is shared by those who remain solvent. Among themselves, however, each is liable only for his own share, and if one pays beyond his share he can require the others to pay their shares to him. Where a cautioner pays, he is entitled to an assignation of the debt and diligence, or securities held by the creditor, unless held by him in security of another claim against the executor.(*u*) The septennial doctrine of limitation does not apply to executor-cautioners.(*v*)

Caution is found in either of two ways:—(1), By the cautioner subscribing what is called an "Act of Caution" in the Sheriff-Clerk's office; or (2), By his signing and delivering a separate "Bond of Caution."(*w*)

183. Act of Caution.—The following is the form in use in the Sheriff-Court at Edinburgh(*x*):—

Edinburgh, the . day of 1883: Compeared who becomes caution that the sum of £ contained in the testament-dative of umquhile wherein is only executor-dative *qua* decerned and to be confirmed to the said defunct, shall be made free and furthcoming to all parties having interest therein as law will; and the said executor becomes bound for the cautioner's relief in the premises; and both parties subject themselves, their heirs and successors, to the jurisdiction of the Sheriff of Edinburgh in this particular, and appoint the Clerk's Office in Edinburgh as a domicile whereat they may be cited to all diets of Court.

(*q*) *Murdoch*, 17th Feb. 1826, 4 S. 479.
(*r*) *Brown*, 17th May, 1836, 14 S. 767.
(*s*) *Ross*, 25th June, 1840, 15 F. 1296.
(*t*) Ersk. 3, 3, 61.
(*u*) Ersk. 3, 5, 11.
(*v*) *Gallie*, 4th March, 1836, 14 S. 647.
(*w*) 21 & 22 Vict. c. 56, § 6.
(*x*) *Smith*, 30th Oct. 1868, 7 M. 42.

184. Bond of Caution and Attestation of Cautioner.—The following are the forms of those in use in the Sheriff-Court in Edinburgh:—

We do hereby BIND and OBLIGE ourselves, our heirs and successors, as cautioners and sureties acted in the Court Books of the Commissariot of Edinburgh, that the sum of contained in the testament-dative of umquhile wherein only execut dative *qua* decerned, and to be confirmed to h , shall be made free and furthcoming to all parties having interest therein as law will, the said execut being always bound for relief as cautioner in the premises; and both parties subject themselves, their heirs and successors, to the jurisdiction of the Sheriff of The Lothians, in this particular, and appoint the Commissary-Clerk's Office in Edinburgh as a domicile whereat they may be cited to all diets of Court, at the instance of all and sundry having interest therein as law will, holding any citation legally affixed, and left for us upon the walls of said Office, as sufficient as if we were personally summoned. IN WITNESS WHEREOF, these presents are signed by , at on the day of eighteen hundred and eighty- , before these witnesses, &c.

ATTESTATION.

I, , one of Her Majesty's Justices of the Peace for the of , do hereby CERTIFY, that is reputed a good and sufficient cautioner for the sum of being the amount of the obligation undertaken by the within Bond of Caution.

(*Name*)
(*Place*)
(*Date*)

185. The Caution may be Restricted by Court.—Where the amount of the inventory is large, it is customary to apply to the Sheriff by petition, craving him to restrict the caution to a specified sum, which is usually considerably less than the amount of the inventory. The petition is intimated by advertisement in one or more newspapers, and the Sheriff afterwards disposes of it in a summary manner, with due regard to the circumstances of the case.

186. Suggestive Form of Petition.—

Unto The Honourable the Sheriff of the petition of A. B., dyer in , executor-dative, *qua* one of the next-of-kin, decerned to the deceased C. D., who

resided at No. Street, Edinburgh, and died there on 1st January, 1883.

Humbly sheweth,

That by decree of your Lordship, dated 1st February, 1883, the petitioner was decerned executor-dative *qua* one of the next-of-kin (or otherwise as the case may be), to the said deceased C. D., and has since exhibited upon oath, in your Lordship's Court (or now produces), an inventory of the personal estate of the said deceased amounting to £ .

That before the petitioner can acquire the title of testament-dative it is obligatory on him to find caution for his intromissions as executor, and he being unable to find caution for the full amount of the inventory, he is desirous of having the caution restricted.

That the greater portion of the claims lodged with the petitioner against the estate of the said deceased C. D. have been discharged, and that this application is made with the concurrence of C. F. and G. H., who are, along with the petitioner, the sole next-of-kin of the said deceased.

May it therefore please your Lordship to direct intimation of this petition to be made in such form as to your Lordship shall seem proper, and thereafter to restrict the caution to be required of your petitioner to £ sterling, or to do otherwise in the premises as to your Lordship may seem expedient.

According to justice, &c.

187. Suggestive Form of Newspaper Advertisement.—

THE ESTATE OF C. D. DECEASED.—Notice is hereby given, in pursuance of an order by the Sheriff of the County of , that a petition has been presented to him by the executor-dative of C. D., who died at on 1st January, 1883, for restriction of the caution required by law to be found by such executor, to the sum of £ , and that if no objection be lodged with the Sheriff-Clerk of the said County by the curt., the Sheriff will thereafter dispose of the petition.

J. P., S.S.C., Edinburgh,
Petitioner's Agent.

188. Testament-Dative.—This is the equivalent of the title *testament testamentar*,—the former being applied to the confirmation of the executor of a person who has died intestate, and the latter to the confirmation of the executor of a person who has died testate(*y*).

(*y*) Ersk. 3, 9, 27; 21 & 22 Vict. c. 56, Sch. D and E.

Before the former title (the purpose of which is indicated in the following section) can be issued, the executor must (1) have been decerned executor-dative by the Sheriff(*z*); (2) have lodged in Court an inventory of the deceased's whole personal estate, with relative affidavit(*a*); and (3) have found caution(*b*). The title is then procured by the executor-dative producing to the Sheriff his extracted decree-dative, or referring to his decree as on the records of the Court, along with any testamentary deeds or writings left by the deceased, and the said inventory of his estate. These papers are thereupon recorded in the Court books, and on the expiration of three lawful days from the date of the decree-dative(*c*) a testament-dative or confirmation of the executor is given by the Court, authenticated by its seal and the Clerk's subscription(*d*). This title has a retroactive effect on the acts of an executor(*e*). No execution can follow on a decree obtained by an executor without a proper confirmation(*f*). A debtor paying to next-of-kin or executor unconfirmed may be compelled to pay a second time if it should afterwards appear that the receiver had not the substantial right to the money, or that the legal right to uplift the money was vested in another(*g*). But the general rule is subject to the exceptions to be afterwards noticed(*h*).

189. Form of Testament-Dative.—This document is usually in the form of the confirmation annexed to the Act 21 & 22 Vict. c. 56, which is as follows :—

I, A. B., Sheriff of the county of [specify county], considering that by my decree, dated [specify date], I decerned C. D., executor-dative *qua* next-of-kin [or other character, as the case may be], of the late E. F., who died at [specify place], on [specify date], and seeing that the said C. D. has since given up on oath an inventory of the personal estate and effects of the said E. F. at the time of his death situated in Scotland [or situated in Scotland and England, or in Scotland and Ireland, or in Scotland, England, and Ireland, as the case may be], amounting in value to . pounds, which inventory has been recorded in my Court books, of date [specify date], and that

(*z*) § 147.

(*a*) 4 Geo. IV. c. 98; also § 159 *supra*.

(*b*) § 182.

(*c*) § 147.

(*d*) Bell's Lect. p. 1035. The confirmation of an executor-creditor may be partial, see § 196. Confirmation not required in certain cases, see § 195.

(*e*) *Chalmers*, 12th May, 1860, 22 D. 1060.

(*f*) *Malcolm*, 8th Nov. 1866, 5 Macp. 18.

(*g*) *Buchanan*, 3rd Nov. 1842, 5 D. 211.

(*h*) § 195.

he has likewise found caution for his acts and intromissions as executor: Therefore I, in Her Majesty's name and authority, make, constitute, ordain, and confirm the said C. D. executor-dative *qua* [specify character] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* [specify character] is known to belong; providing always that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the Commissariot(*i*) [specify county], and signed by the Clerk of Court at [specify place], the [specify date].

To be signed by the Commissary Clerk or his depute,(*j*) and sealed with the seal of office.

190. Eik to Testament-Dative.—In certain circumstances already explained,(*k*) an additional inventory falls to be given up. Where this is the case, the additional estate has to be added or eiked to the testament-dative, and this is usually done in the following form—

FIRST EIK TO THE TESTAMENT-DATIVE OF UMQUHILE C. D., Grocer, who resided at No. Glebe Street, Edinburgh.—The said C. D. had pertaining and resting owing to him at the time of his decease.

(For additional inventory confirmed, *vide* "Record of Inventories," vol. , page .)

I, ARCHIBALD DAVIDSON, Esquire, Sheriff of The Lothians, considering that by my decree, dated I DECERNED O. M., builder, residing at George Street, Edinburgh, executor-dative *qua* of the said C. D., who died at Edinburgh, on 1st January, 1883, and that the said O. M. gave up an inventory of the personal estate and effects of the said C. D. on 1st February, 1883, and expede a testament-dative upon 1st March, 1883: And seeing that the said O. M. has now given up, on oath, an additional inventory of the personal estate and effects of the said C. D. at the time of his death, including the proceeds accrued thereon to date of oath, situated in Scotland, amounting in value to , which additional inventory, as before written, has been recorded in the

(*i*) Still competent to affix this seal, notwithstanding abolition of Commissary Court, 39 & 40 Vict. c. 70 (1876), § 35.

(*j*) Or Sheriff-clerk or his depute, 39 & 40 Vict. c. 70, § 28.

(*k*) § 172.

Court books of the Commissariot of Edinburgh, of date , and that he has likewise found caution for his acts and intromissions as executor: THEREFORE I, in Her Majesty's name and authority, of new MAKE, CONSTITUTE, ORDAIN, and CONFIRM the said O. M. executor-dative *qua* to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, contained in the foresaid additional inventory, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* is known to belong: Provided always that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the seal of office of the Commissariot of the County of Edinburgh, and signed by the Clerk of Court at Edinburgh, the 1st May, 1883.

, Commissary-Clerk.

191. Where Property Partly in England or Ireland.—Where the deceased had personal estate in England or Ireland, as well as in Scotland, the executor may obtain a title to the English or Irish estate by production of the Scotch testament-dative in the principal Court of Probate in England, or in the Court of Probate in Dublin. A copy of the testament-dative falls to be deposited with the registrar. Formerly a certified copy of the interlocutor of the Commissary finding that the deceased died domiciled in Scotland, fell also to be sent to the registrar; but this is not now necessary if the inventory of the estate states the domicile of the deceased(*l*). The testament-dative will thereupon be sealed with the seal of such English or Irish Court and returned to the person producing the same, with the following marking thereon by the registrar: "Let this confirmation be sealed with the seal of Her Majesty's Court of Probate in England (or Ireland as the case may be) pursuant to the statute 21 & 22 Vict. cap. 56, § 12 (or § 13), London, the 1st day of February, 1883"; and such confirmation shall thereafter have the effect of Probate in England or Ireland respectively.(*m*) It is competent to so seal an additional confirmation whether the original confirmation shall have been sealed or not, and although the additional confirmation shall not contain any estate of the deceased situated in Scotland.(*n*)

192. What Property requires to be Confirmed.—Excepting

(*l*) 39 & 40 Vict. c. 70, § 41.
(*m*) 21 & 22 Vict. c. 56, §§ 12, 13.
(*n*) *Ibid.* § 42. See also § 233, *infra*.

in the case of executor's creditor, as afterwards noticed,(*o*) every person requiring confirmation must confirm the *whole* moveable estate of the deceased person, to which such person shall make oath(*p*). With regard to personal estate situated in England, it would appear that formerly the Court of Probate would only seal a confirmation which included the whole of the deceased's personal estate in that country(*q*). But by the Sheriff-Court Act, 1876,(*r*) it is provided—"When an additional inventory has been given in and recorded, and confirmation granted in a Sheriff-Court in Scotland, of estate situated in England or Ireland of a person who died domiciled in Scotland, and the additional confirmation shall be produced in the principal Court of Probate in England, or in the Court of Probate in Dublin, as the case may be, and a copy thereof deposited with the registrar of the Court, such additional confirmation shall be sealed with the seal of the Court and returned to the person producing the same, and that whether the original confirmation shall have been sealed with the seal of the Court or not, and although the additional inventory confirmed shall not contain any estate of the deceased situated in Scotland, and such additional confirmation when so sealed shall thereafter have the same force and effect as if probate or letters of administration, as the case may be, had been granted by the Court of Probate in which it had been sealed."

193. Confirmation *quoad omissa et male appreciata.*—If the whole succession be not given up in the inventory, the executor or any one interested may apply to the Sheriff to have the omission rectified(*s*). Confirmations of this kind are almost unknown in practice, except in the case of executor's creditors who, as afterwards noticed(*t*), are entitled to expede a partial confirmation.

194. Confirmation *quoad non executa.*—This title does not apply to the case of an executor-dative, but to the case of an executor-nominate who dies before he has disposed of the whole of the estate in his confirmation.

195. Cases where Confirmation unnecessary.—In the following cases confirmation is not required to complete the executor's title :—

(*o*) § 196.
(*p*) 4 Geo. IV. c. 98, § 3.
(*q*) *Hutcheson*, Jour. of Jurisprudence, 1864, vol. viii. p. 55.
(*r*) 39 & 40 Vict. c. 70, § 42.
(*s*) Bell's Prin. § 1897.
(*t*) § 196.

1. Where the executor or next-of-kin, or other representative, obtains actual possession of the fund or estate.

2. Where a debtor is willing to pay or deliver without the exhibition of confirmation.

3. Where the deceased executed a special assignation or disposition, though not intimated or published during the deceased's lifetime.

4. Where in a personal bond the substitute is named,—the right vesting by his mere survivance of the institute.

5. *Jus relictæ* and legitim vest in the widow and children *ipso jure;* also the husband's claim on his wife's death to a share of her personal estate, but the parties can only recover from the deceased's debtors through the medium of the executors(*u*); and

6. Where the executor has to sue for a doubtful claim, it is sufficient to expede confirmation before extracting the decree(*v*).

196. Confirmation by Executors' Creditors of Intestate.—Confirmation in this character may be obtained to the effect of administering only to so much of the property as may be sufficient to pay the creditors' debt. The title is regarded rather as diligence than as a proper title of administration,(*w*) or as simply creating a burden or *nexus* upon the subject confirmed.(*x*) Confirmation as executor-creditor was held preferable to an arrestment prior in date(*y*). The necessity for such an appointment arises only when no person represents the deceased against whom an action might be instituted, or where the executors confirmed have omitted or undervalued part of the deceased's effects in their confirmation(*z*). Where diligence is begun in debtor's lifetime, and has attached part of his funds, it may be prosecuted by the creditor without obtaining confirmation(*a*). After the next-of-kin have partially confirmed, a confirmation as executor-creditor *ad omissa* is the only valid diligence by which the remainder can be attached, seeing that the omitted funds remain *in bonis* of the deceased.(*b*) An executor-creditor, although not confirmed, has a good title to sue,(*c*) and when his title is unchallenged, he need not in suing

(*u*) Bell's Lect. p. 1049; Bell's Prin. § 1892.
(*v*) *Lee*, 17th May, 1816, 19 F.C. 118, 4 Geo. IV. c. 98.
(*w*) Ersk. 3, 9, 34; 1695, c. 41.
(*x*) *Smith*, 27th June, 1862, 24 D. 1143; see p. 1169 of report.
(*y*) *Wilson*, 26th June, 1823, 2 S. 430.
(*z*) M'Laren, § 1675.
(*a*) M'Laren, § 1676.
(*b*) *Aitkinson*, 14th Jan. 1808, 14 F.C. 76.
(*c*) *Maitland*, 23rd Nov. 1827, 6 S. 109.

produce his grounds of debt.(*d*) An executor-creditor must find caution in the same way as an executor-dative, and he may also in like manner apply to have the caution restricted(*e*).

197. Procedure where Creditor holds a Liquid Document of Debt.—The applicant presents a petition as in other cases of executry-dative, but his petition must be intimated in the *Edinburgh Gazette*(*f*) at least once immediately after the application is made, and a copy of the *Gazette* produced before the confirmation can be further proceeded in. Like other executors, he must give up the whole estate in his inventory, and pay corresponding duty, although his confirmation and the caution to be found by him may be restricted to the sum or value of the estate which he confirms.(*g*) The document of debt may be a bond or bill by the deceased or the extract of a decree of Court against him. An office copy of an English judgment for debt was held a sufficient document of debt.(*h*)

198. Procedure where Creditor holds an Illiquid Document of Debt.—The creditor may charge the nearest of kin of the deceased to confirm executor to him within twenty days, which charge shall be a passive title against the person charged, as if he were a vitious intromitter, unless he renounce the succession; in which case the charger may proceed to have his debt constituted, and the *hæreditas jacens* of moveables, *i.e.*—moveables which have vested in the deceased and which have not been transferred to his legal representatives, declared liable by a decree *cognitionis causa*.(*i*) It would appear that a charge is not necessary where the creditor restricts his demand to a claim for decree *cognitionis causa tantum*—*i.e.*, for the sake of constituting the debt. On obtaining decree, the creditor may apply by petition to be confirmed. If an heir has not taken up the estate and has renounced to be heir, he cannot be held to be personally liable(*j*.) And if the next-of-kin take no notice of the charge to confirm, and are afterwards proceeded against as vitious intromitters, they may still escape personal liability by lodging a minute of renuncia-

(*d*) *Dickson*, 27th May, 1828, 6 S. 856.
(*e*) §§ 182, 185.
(*f*) 4 Geo. IV. c. 98.
(*g*) Bell Lect. 1046.
(*h*) *Stiven*, 12th Feb. 1868, 6, M. 370.
(*i*) 1695 c. 41; 4 Geo. IV. c. 98; for procedure see *Greig*, 1 Mar. 1837, 15 Sh. 697.
(*j*) *Forrest*, 26th May, 1863, 1 Macph. 806; Bell's Lect. 1047.

tion, but they will be liable to the creditor in the expense of such proceedings.(*k*)

199. Conjunction of Creditors in Executorship.—A decree-dative as executor-creditor, not followed by confirmation, does not exclude other creditors from being confirmed and conjoined. All creditors properly qualified may ask to be conjoined in an application for confirmation so as to participate equally in the estate to be confirmed,(*l*) or the creditor confirmed may be summoned by the others to communicate(*m*); all creditors using legal diligence within six months after the deceased's death are entitled to share *pari passu* on the fund confirmed by them, the posterior creditors sharing the expense incurred by the creditor first confirmed.(*n*).

200. Reduction of Confirmation by Creditors.—Confirmation by creditors may be reduced by sequestration within seven months from the debtor's death. The Bankruptcy Act provides that where the estate of a deceased debtor is sequestrated within seven months after his death, any preference or security for any prior debt acquired by legal diligence on or after the sixtieth day before the debtor's death, or subsequent to his death, and any preference or security acquired for a prior debt by any act or deed of the debtor which has not been lawfully completed for a period of more than sixty days before his death, and any conformation as executor-creditor after the debtor's death, shall, in these several cases, be of no effect in competition with the trustee. But the creditor so deprived of his diligence or conformation shall have preference for the expenses incurred to him in such diligence or confirmation.(*o*)

201. Confirmation by Creditors of Next-of-Kin of Intestate.—Where the next-of-kin of the deceased do not enter to the succession so that *their* creditors cannot attach the executry to which they are entitled, such creditors can either require the Procurator-Fiscal to confirm and assign the estate to them, or they can obtain themselves decerned executors-dative to the deceased as if they were his creditors. But a preference is reserved to the

(*k*) *Davidson* v. *Clark*, 13th Dec. 1867.

(*l*) *Willison*, 17th Dec. 1840, 3 D. 273.

(*m*) *A. of S.* 28th Feb. 1662.

(*n*) *Macdowal*, 19th Feb. 1742, M. 3936; Bell's Prin. § 1900.

(*o*) 19 & 20 Vict. c. 79, § 110.

creditors of the deceased doing diligence within a year and a day of the death,(*p*) if not now for a longer duration.(*q*)

202. The Granting of Confirmation regulated by Situation of Property.—While it is the function of the law of the domicile to point out the intestate's next-of-kin(*r*), to decide their legitimacy(*s*), and to regulate the succession to and distribution of the moveable estate, the questions whether the special title of administration or confirmation be requisite to vest the interest, and what security will be required by the executor administering, fall to be determined by the law of the *situs* or where the specific estate is locally situated.(*t*)

203. Where Joint Executors Appointed.—When two or more persons are confirmed executors they form a species of society, and it would be imprudent to pay to one unless the others are parties or consenting to the payment.(*u*) In suing the deceased's debtors all the executors must concur unless it can be shown that any refuse without good cause.(*v*) Where two out of six executors became bankrupt, the remaining four executors were found entitled to sue without the concurrence of the others.(*w*) Executors *qua* next-of-kin are entitled to sue separately for their own shares of the succession.(*x*) The office on the death of one devolves on the survivors and falls entirely on the death of the survivor, except in cases where the appointment was purely beneficial.(*y*) Where one or more of the executors acquire an English domicile they remain, it would seem, amenable as executors to the jurisdiction of the Scottish Courts.(*z*) Where at least the executor is still administering the estate the Scotch Courts have jurisdiction, and it is even thought that where the administration in Scotland has been completed, the executor remains amenable to the Scottish Courts as regards accounting for the estate,(*a*) but a mere appointment as executor is not sufficient *per se* to render him amenable.(*b*)

(*p*) 1695, c. 41.
(*q*) M'Laren, § 1680.
(*r*) See § 84.
(*s*) See § 126.
(*t*) *Preston*, 29th March, 1841, 2 Rob. 88; M'Laren, § 82.
(*u*) Barclays M'Glashan, p. 131; M'Laren, § 1740.
(*v*) Ersk. 3, 9, 40.
(*w*) *Rogerson*, 9th March, 1833, 11 S. 563.
(*x*) *Torrance*, 24th Nov. 1841, 4 D 71.
(*y*) Bell's Lect. p. 1045; Ersk. 3, 9, 38; M'Laren, § 1737.
(*z*) *Mag. of Wick*, 11th Dec. 1849, 12 D. 299.
(*a*) *MacKirdy's*, 1st July, 1882, 19 S.L.R. 768.
(*b*) *Robson*, 5th Nov. 1867, 6 M. 4.

Where two out of five executors, who had jointly confirmed as executors in a Scotch executry, were abroad, an action was allowed to proceed in Scotland against the remaining three.(*c*)

204. Duties of an Executor.—The first duty of an executor-dative, after he shall have been appointed, is to realise the executry estate. He should lose no time in obtaining confirmation, if confirmation be necessary, and after having qualified himself, it is his imperative duty to reduce into possession the whole of the deceased's available means and estate with a view to distribution.(*d*) In discharge of this duty, he is bound to take all proper measures, legal and otherwise, but not to engage in fruitless litigation(*e*); he is bound to deposit in bank, in an account in name of himself as executor, all monies due to the deceased as received,(*f*) but he cannot be compelled to distribute the estate among the next-of-kin, or to pay any debts thereout, except preferable debts, till the expiration of six months from the death.(*g*) He is not entitled to pay the next-of-kin without first paying or providing for the payment of all the deceased's debts,(*h*) nor is he entitled to debit himself with any commission for managing the estate.(*i*)

The executry estate should be kept clearly distinguishable from the executor's own property, to prevent his creditors interfering with it in case of his bankruptcy.

The executor must exhibit in the proper Court, upon oath, as already indicated(*j*), an inventory of the personal estate, duly stamped, and thereafter the debts and government duties fall to be paid.

Certain debts are preferable on the deceased's estate and may be paid by the executor without waiting the expiration of the six months, and without decree. The following may be so paid :—

1. Sick-bed and funeral expenses, including physician's fees, medicines, and surgeon's accounts, with the expense of mournings for the widow, and such decorations and state in the funeral as the rank and circumstances of the deceased warrant; but the wife's funeral expenses are not preferable over the husband's estate.(*k*)

(*c*) *Wick*, 11th Dec. 1849, 12 D. 299.
(*d*) *Muir*, 3rd Nov. 1876, 4 R. 74.
(*e*) *More's Executors*, 24th Jan. 1835, 13 Sh. 313.
(*f*) M'Laren, § 1974.
(*g*) Gardner, 28th Nov. 1810, 16 F. C. 59.
(*h*) *Lamond*, 8th March, 1871, 9 M. 662.
(*i*) *Malcolm*, 10th Dec. 1869, 8 M. 272.
(*j*) § 149 *et seq.*
(*k*) Bell's Prin. §§ 1403, 1900; Bell's Com. 2, 149.

The expense of obtaining confirmation falls to be paid out of the deceased's general estate.(*l*)

2. Wages to domestic and farm servants, including reapers and other occasional servants for agricultural labour, for the term current at the death, whether a year, half year, or month ; also the wages of gardeners where they combine outdoor labour with domestic service. The wages or salaries of clerks, managers of merchants and manufacturers, and of servants of skilled artisans are not preferable debts.(*m*) But by the Bankruptcy Amendment Act, 1875, it is provided that "the wages of clerks and shopmen and servants employed by a bankrupt shall be entitled to the same privilege as the wages of domestic servants, to an extent not exceeding four months' wages prior to the date of sequestration being awarded, or, where sequestration is not awarded, prior to the concourse of diligence for distribution of the estate of a party being notour bankrupt, and not exceeding the sum of £50; and the wages of workmen employed by a bankrupt shall be similarly entitled to an extent not exceeding two months' wages prior to the same respective dates."(*n*)

3. The house rent of the deceased for the year current at his death, also taxes due to the crown.(*o*)

Sums due by ministers of Established Church to Widows' Fund are preferable even to funeral expenses. The creditors of the deceased have a preference over those of the next-of-kin within a year.(*p*)

The executor should be particular in ascertaining that there is a sufficiency of assets for the discharge of all the preferable debts before he pays any of the ordinary debts, as if he should pay any of the latter, without having sufficient to pay the former, he will have to pay the former out of his own estate. As a general rule, an executor should pay no debt of the deceased except on decree, unless fully satisfied of the debt being legally due, and in any event not till the expiration of six months from the death, except in the case of privileged debts before mentioned(*q*) ; *a fortiori* he should not till then distribute the estate among the next-of-kin. An executor is safe in paying *primo venienti* after the six months, provided he is not interpelled by creditors and has reason to

(*l*) *Hog*, 14th May, 1800 ; 4 Pat. App. 581.

(*m*) Bell's Prin. § 1404.

(*n*) 38 & 39 Vict. c. 26, § 3 ; Bell's Com. 2, 149.

(*o*) Bell's Prin. §§ 1405-1409.

(*p*) Act 1695, c. 41.

(*q*) Bell's Prin. § 1900 ; M'Laren, § 1981 ; Ersk. 3, 9, 4 ; Beith, 30th Nov. 1875, 3 R. 185.

believe that the estate is solvent.(*r*) In that case also he may pay a debt due to himself by retention.(*s*) But where the estate is likely to prove insolvent, or where the executor is exposed to double distress by creditors, he may either institute a process of multiplepoinding for the judicial distribution of the estate he has reduced into possession,(*t*) or he may himself apply to the proper Court for sequestration, or allow the estate to be wound up by a judicial factor under the Bankruptcy Act.(*u*) So long as the executors are willing to act, the Court will not appoint a judicial factor.(*v*) The Court will not appoint the executor to be factor.(*w*)

205. The Powers Inherent in the Office of Executor.—As a general rule, executors duly confirmed, possess, at common law, all the powers which were competent to the deceased when alive,(*x*) and no person interested in the succession can defeat them in the execution of their office, except by bill of suspension and interdict.(*y*) They have therefore full power to uplift and receive the whole moveable estate contained in the inventory, and to pay all debts and charges which can be shown to affect the estate where it appears to be sufficient(*z*); to call for all documents of debt due to the deceased, and for statements from bankers and others alleged to be in possession of his funds(*a*); to pursue and defend actions, charging the estate with expenses reasonably incurred(*b*); to refer *doubtful* claims to arbitration,(*c*) and also claims for tradesmen's accounts and the like, where the question to be determined is as to the amount only(*d*); also to employ law agents to transact the ordinary duties of trust management at the expense of the trust.(*e*) But expenses occasioned by the executor's own negligence will be chargeable

(*r*) *More's Executors*, 24th Jan. 1835, 13 Sh. 313.

(*s*) *Elder*, 2nd July, 1859, 21 D. 1122.

(*t*) *Gardner*, 28th Nov. 1810, F.C. 59; M'Laren, §§ 1981-2138.

(*u*) 19 & 20 Vict. cap. 79; *A of S.* 25th Nov. 1857.

(*v*) *Petition, Macfarlane*, 6th Mar. 1857, 19 D. 656.

(*w*) *Pennycook*, 20th Dec. 1851, 14 D. 311.

(*x*) *Miles*, 1 Dec. 1830; 9 Sh. D. B. 111.

(*y*) *Hog*, 1838, 16 Sh. 1275; *Barnet*, 14th Dec. 1831, 10 S. 128.

(*z*) M'Laren, § 1834.

(*a*) *Maclauchlan*, 9th July, 1857, 19 D. 960.

(*b*) *Graham and others*, 22nd Nov. 1860, 23 D. 41.

(*c*) *More's Executors*, 24th Jan. 1835, 13 Sh. 313; *M'Kersies*, 25th June, 1872, 10 M. 861.

(*d*) *Thomson's Trs.* 13th Dec. 1867.

(*e*) *Hay*, 19th Feb. 1861, 23 D. 594.

against himself.(*f*) One of a number of executors may claim for the whole number in a sequestration.(*g*) An executor must not stop short of actual diligence against debtors if that be necessary to recover any part of the executry estate.(*h*)

An executor is not a trustee in the sense of a depository for behoof of legatees, who are merely creditors. He is entitled to retain as much as will pay any debt due to himself before any other creditors whose debts are of equal degree, for the reason that he cannot sue himself, and would therefore be in a worse position than all the rest of the creditors.(*i*)

An executor may indorse a promissory-note or bill made payable to the deceased or his order.

206. Personal Liability of Executors.—Executors, as trustees, are accountable for the due collection and distribution of the estate to the extent of the inventory.(*j*) The liability is incurred (1) to the creditors of the deceased, and (2) to his next-of-kin or beneficiaries.

In the first class the liability depends on the nature of the deceased's obligations to the creditor; in the second, on the nature of diligence prestable from executors.(*k*)

1. Liability to creditors of the estate,—is incurred by executors personally (all questions respecting the liability of the deceased's estate being here necessarily excluded), either (1) by their own adoption of the deceased's engagements as current contracts, or (2) by negligence, consisting in the inequitable disposal of funds with which they were bound to pay the creditors.

In the first case the liability of the executor is subject to the same rules of law as affect contracts of his own making, the criterion of liability being furnished by the terms of the obligation, and, if indefinite, personal liability is in no case presumed. Executors were held liable to a law agent, employed by one of them in relation to the business of the executry, although it was alleged that his employment was contrary to the orders of the others.(*l*) And where executors *qua* executors accepted a bill it was held that

(*f*) *A. B. Petition*, 21st Dec. 1855, 18 D. 286; *Law*, 20th July, 1876, 3 R. 1192; *Macpherson*, 8th Dec. 1869, 8 M. 246.

(*g*) *Watson*, 27th June, 1848, 10 D. 1414. [362.

(*h*) *Forman*, 2nd Feb. 1853, 15 D.

(*i*) *Jamieson*, 24th Jan. 1872, 10 M. 399. *Murdoch*, 17th Feb. 1826, 4 S. 479.

(*j*) *Renton*, 14th Nov. 1851, 14 D. 35.

(*k*) M'Laren, § 2311; Bell's Prin. § 1900; Bell's Com. 2, 80.

(*l*) *Stewart*, 20th May, 1823, 2 S. 320.

want of funds formed no defence in a question with onerous holders.(*m*)

In the second case, the liability for injuries caused by the executor's own improper acts or negligence is purely personal, since he is *ex hypothesi* not acting under the protection of the powers implied in his office. Thus, gratuitous trustees were found personally liable for damage sustained by a creditor in consequence of their having created an illegal preference in favour of another creditor(*n*); also for having conveyed the entire succession without providing for payment of all the deceased's obligations.(*o*) But as a creditor, in virtue of his right to have the deceased's estate made forthcoming, may insist in any claim against the executors competent to a beneficiary,(*p*) the grounds of liability will be further illustrated under the next question.

2. Liability to personal representatives—being responsibility for actual intromissions, and for such diligence in respect to matters omitted as they might be expected to employ in their own affairs(*q*). Any delay in the recovery of debts due to the estate will be at the executor's own personal risk(*r*). Executors are chargeable with interest on outstanding debts after the lapse of a year unless the failure to recover be not attributable to their neglect.(*s*) They are liable for delay in the recovery of assets, although personally interested in the estate as creditors(*t*); also for discharging a security and improperly consenting to the liberation of a debtor(*u*). Money left by the deceased in the hands of one of his executors, or invested on personal security, is no justification for not bringing it into a position of security.(*v*) Such a position may be one of personal obligation. A man of means, unable for a time to find an eligible investment for funds held by him as trustee under a deed which directed him to invest the same "on heritable security, railway debentures, the public funds, or other good securities," was held entitled to retain the money in his own hands under a personal obligation to repay and to execute at any

(*m*) *Eaton, &c.*, 25th May, 1837, 15 S. 1012.

(*n*) *Young*, 15th June, 1841, 3 D. 1020.

(*o*) *Cruickshank*, 24th April, 1845; 4 Bell, 179; *Lamond*, 8th March, 1871, 9 M. 662.

(*p*) M'Laren, § 2315.

(*q*) Ersk. 3, 3, 36.

(*r*) M'Laren, §§ 1954-2347.

(*s*) *Campbell*, 15th June, 1840, 2 D. 1084; M'Laren, § 2348.

(*t*) *Forman*, 2nd Feb. 1853, 15 D. 362.

(*u*) *Abercrombie* v. *Innes*, 1723; Rob. Ap. Cas. 457.

(*v*) *Moffat*, 31st Jan. 1834, 12 Sh. 369.

time any formal deed that might be required—he meanwhile paying into bank four per cent. as interest on the money.(*w*) Executors were found not liable for the loss of money placed by the deceased in bank until an investment was obtained(*x*). Trustees and executors investing on personal security, bills or personal bonds, are liable to replace the money with interest, but they are not liable for loss by robbery, fire, or other casualty.(*y*) They are liable for money placed by them in bank, unless bank is in good credit(*z*) ; to replace money inadvertently or from error in fact or in law, paid to a person not entitled to receive it, unless such person had a legal title at the time, or that blame attached to the beneficiary himself.(*a*) Executors are liable in a joint responsibility only where it amounts either to *culpa lata* or to supine negligence(*b*). They are not jointly responsible for fraud or gross mismanagement.(*c*) They are responsible for the safe custody of documents belonging to the estate.(*d*) An executor depositing funds to his own credit is liable in penal interest(*e*) ; and if he mixes the funds with his own property, the beneficiaries are entitled to any portion of the blended property which he cannot show to be his own.(*f*) Executors misappropriating trust monies are guilty of a punishable offence.(*g*) Executors who had not kept a separate bank account for the executry estate were, under certain circumstances, found only liable for interest on their intromissions at four per cent.(*h*) Where funds were lost in the hands of the executor's agent after realisation, the loss was held not to diminish the free executry on which legitim was to be calculated.(*i*) A widow decerned executrix, but who, without confirmation or making up inventories intromitted with the deceased's effects, was held personally liable for a debt.(*j*)

207. Death of Executor.—The office of executor is personal

(*w*) *Russell*, 20th Nov. 1869, 7 S.L.R. 99.

(*x*) *Pearson*, 19th Nov. 1825, 4 Sh. 205.

(*y*) M'Laren, §§ 2349, 2350, 1972.

(*z*) *Pearson* supra.

(*a*) M'Laren, § 2353.

(*b*) *Thomson*, 16th Feb. 1838, 16 Sh. 560 ; M'Laren, § 2368.

(*c*) M'Laren, § 2372.

(*d*) *M'Lauchlan*, 9th July, 1857, 19 D. 960.

(*e*) *Clark*, 17th Dec. 1856, 19 D 187 ; but see *Russell* supra.

(*f*) M'Laren, § 1977.

(*g*) *Acct. of Court*, 8th Dec. 1853, and 7th Feb. 1854, 16 D. 163, 489.

(*h*) *Malcolm*, 10th Dec. 1869, 8 M. 272.

(*i*) *Dalhousie*, 26th March, 1868, 6 M. 659.

(*j*) *Cunningham, &c.*, 8th Feb. 1827, 5 S. 315.

and not transmissible to heirs, except where the executor is also general disponee or residuary legatee of the deceased and beneficially interested in the estate.(*k*)

The chief points under this head are:—

1. Survivorship in appointment of executors. The office on the death of one accrues to the survivors or survivor, and when purely a trust for others falls entirely on the death of the whole.(*l*)

2. Executors dying before realising. Where the executor dies *after* expeding confirmation, but before realising the whole of the funds, a title must be made up to such unrealised funds by another executor.(*m*) The office may be obtained by the next-of-kin of the person whose estate is to be administered, who will present a petition to the Commissary as in the ordinary case, but will confine the inventory to the unrealised portion of the estate. A judicial factor on an estate vested in trustees and executors who have in similar circumstances died, may be appointed executor *qua factor*.(*n*)

3. Executors dying after realising. Where, again, the executor dies *after* realising, but before distributing the funds, the estate can be taken up by a judicial factor appointed by the Court, or taken up by diligence,(*o*) or the party entitled to the funds, or the administration thereof may establish a title by a declaratory adjudication(*p*); but not by confirmation, because the former executor had actually recovered the estate, for effecting which confirmation is only applicable.

208. Discharge of Executor.—No formal exoneration of an executor is necessary; if he be sued by creditors or others interested, he may competently plead that the inventory in the testament-dative is exhausted by lawful payments, if not by mere decrees ordaining him to make payment. If there be any debts given up in the inventory as due to the deceased which have not been received by the executor, he will be exonerated as to these by producing decrees against the debtors, and by assigning such decrees to the creditors so suing him.(*q*)

(*k*) Bell's Lect. p. 1045; Ersk. 3, 9, 38.

(*l*) M'Laren, § 1738; *Bones*, 21st Dec. 1866, 5 Macp. 240.

(*m*) *Nicol*, 10th June, 1856, 18 D. 1000; M'Laren, § 1685

(*n*) Bell's Lect. p. 1046.

(*o*) M'Laren, §§ 1651, 1685

(*p*) Bell's Lect. p. 1046.

(*q*) Ersk. 3, 9, 47.

INTESTATE SUCCESSION

IN

PERSONAL ESTATE IN ENGLAND.

With a view to aid to a better understanding of the answer based on English law given in the preceding table, the following statement of the leading principles and maxims of that law respecting succession has been compiled and taken from various standard works.

Definitions and General Rules.

209. Real and Personal Estates.—These terms coincide in many particulars with the terms "heritable and moveable" in the law of Scotland; but they are by no means synonymous in their extent and application.(*a*)

In the law of England, lands, houses, and all immoveable property were formerly called tenements or things held; they were also called hereditaments, because on the death of the owner they devolved by law to his heir. So that the phrase, "lands, tenements, and hereditaments," was used to express all sorts of property of the *immoveable* class, and the expression is still in use. The other, or *moveable* class of property, was known by the name of goods or chattels.

In later times, lands and tenements were designated *real* property, more from the nature of the legal remedy for their recovery than because they are real things; and, on the other hand, goods and chattels were called *personal* property, because the remedy for their abstraction was against the person who had taken them away.

The division of property into corporeal and incorporeal also obtains in English law: the former comprehending all things which are visible and tangible, and the latter what are not so. Thus, a house is corporeal, but the rent payable for it is incorporeal.

Real property is divided into freehold and copyhold.

Freehold is the popular name given to land held of the crown by virtue of the Act 12 Car. II. c. 24. In nearly every case a

(*a*) Robertson on Personal Succession, 307.

freeholder holds his estate by the service of mere fealty. Freehold estates are subdivided into freeholds of inheritance, and freeholds for life, and the former are further divided into estates in fee-simple and estates in fee-tail. Where a title is to A and his heirs or heirs-general, the right is fee-simple ; where to A merely, it is freehold for life. An estate tail is a larger estate than an estate for life, as it may endure so long as the first owner of the estate has any issue of the kind mentioned in the deed. It somewhat resembles the entail tenure in Scotland.

Copyhold is the name given to property held by the custom of some manor by record of Court Roll. Formerly copyholders held their property at the will of the lord of the manor ; but now, so long as the copyholder complies with the custom, he cannot be deprived of his tenancy. The right is practically as secure as a freehold. Each manor has its own peculiar customs.

Personal property has been generally defined as anything that can be killed, eaten, stolen, broken, or burnt, and particularly stolen, as it is pointed out that no man, however feloniously disposed, can run away with an acre of land.(*b*)

In questions regarding succession between the heir and executor, the following distinctions are to be noticed : "Leases or leasehold estates for a term of years, and whether limited to heirs or not, are personalty, and go to the executor ; also a lease *pur autre vie*, but the heir of the lessee may take as special occupant.

The following also are personal property : Rights of presentation to church livings ; annuities, even when limited to the heir, unless they issue out of land ; copyrights and patent rights ; mortgage debts—*i.e.*, debts due to the mortgagee ; estates by *elegit* ; deer in a park—*i.e.*, a park by prescription ; conies in a warren ; doves in a dove house ; fish in a pond, if the deceased was owner of the freehold. Canal shares, &c., are real at common law, but in almost all instances special statutes have declared them personal.

The right of the heir or executor to fixtures varies according to the nature of the interest which the deceased had in the freehold—whether he was tenant in fee, tenant for life, tenant for years, &c.(*c*)

210. "Executors" and "Administrators."—These terms are analogous to the terms "executor-nominate" and "executor-dative" in Scotch law. Administrators are appointed (1) whenever

(*b*) Williams on Real Property, 1, 5, 10, 34 ; Paterson's Comp. pp. 10-69.

(*c*) Pat. Comp. p. 239.

an intestacy occurs, or (2) whenever a will is left which does not appoint an executor, or to which there is no executor capable of acting or willing to act. In the first case the person appointed is styled simply administrator, but in other cases his title is qualified according to his appointment, which may be "administrator with a will," "administrator *de bonis non*"—*i.e.*, of the effects left unadministered by a former administrator, "administrator during minority," "*pendente lite*," "*durante absentia*," and some others.(*d*)

211. Executor *de son tort*.—Is a person who, without authority, interferes and acts as administrator, by which he subjects himself to all the liabilities, but has few of the privileges of, an executor. The term generally corresponds with a vitious intromitter in Scotch law.(*e*)

212. Vesting of Succession.—In the case of an executor the personal estate vests from the date of the death, but in the administrator from the date only of the letters of administration—his title, however, for many purposes, relating back to the date of death.(*f*)

213. Next-of-Kin: Who these are.—The question who are the next-of-kin under the Statute of Distributions is decided by the rules of the *civil* law. But there is no difference between the rules of the civil and those of the canon law, except in reckoning the collateral line. In that line the computation by the civil law is made by counting upwards from either of the persons related to the common stock, and then downwards again to the other, reckoning a degree for each person, ascending and descending; while the computation by the canon law is made by beginning at the common ancestor, and reckoning downwards, and in whatever degree the two persons or the most remote of them is distant from the common ancestor, that is the degree in which they are related to each other.(*g*)

The following diagram shows the operation of the above rules according to both laws; the numeral letters at the top denote the degree of kindred by the civil law, and the figures at the bottom the degrees by the canon law:—

(*d*) Horsey's Excrs. 155.
(*e*) Pat. Comp. p. 232.
(*f*) Pat. Comp. p. 227.
(*g*) 2 Black's Com. 207; Allnutt, 176; Rob. on Per. Succ. 329.

	Lineal Kindred.	Collateral Kindred.		
Ascending Line.	IV. Great-grandfather's father. 4.			
	III. Great-grandfather. 3.	V. Great-great uncle. 4.		
	II. Grandfather. 2.	IV. Great-uncle. 3.		
	I. Father. 1.	III. Uncle. 2.	V. Great-uncle's Son. 3.	
	Intestate.	II. Brother. 1.	IV. Cousin-german. 2.	VI. Second Cousin. 3.
Descending Line.	I. Son. 1.		III. Nephew. 2.	V. Son of Cousin-german. 3.
	II. Grandson. 2.			IV. Brother's Grandson. 3.
	III. Great-grandson. 3.			

Upon this diagram it has to be observed that although the children and parents of the intestate are both in the first degree of kinship, the children are preferred; of those in the second degree the brothers are preferred, and next in order are uncles or nephews, and lastly cousins.

In the Statute of Distributions the words "legal representatives" are not used for next-of-kin, but for the children of the deceased or their children only, or the descendants of the next-of-kin; the statute means persons substituted in the place of others deceased.(*h*)

214. Half-Blood.—A brother or sister of the half-blood, whether by the father or mother's side, shares equally with the whole blood, both being equally near-of-kin to the deceased.(*i*)

(*h*) Allnutt, p. 380.

(*i*) Williams' Executors, 1348

215. The Mother and her Relations.—The mother shares equally with the brothers and sisters and their issue, if any. The mother's relations share equally with the father's relations.(*j*) But relationship by marriage, except in the case of a wife, gives no title to a share of the intestate's estate under the Statute of Distributions. Therefore if the intestate had a son and daughter, and they both die—the former leaving a wife, and the latter a husband—upon the intestate's death afterwards such husband and wife have neither of them any claim on the estate.(*k*)

216. *Per Capita* **and** *Per Stirpes.*—These terms operate in English law in the same way as in the law of Scotland, excepting (1) that by the English law representation is not carried beyond brothers' and sisters' *children*; and (2) that among collaterals there is what is termed taking *quasi* by representation. Thus, where all the brothers and sisters of the intestate are dead, a mother of the intestate is entitled along with the children of the deceased brothers and sisters: in such case, likewise, the child or children of a deceased brother or sister take *quasi* by representation, the same share which the parent, if living, would have taken. The representation is created by the mother taking an original share in her own right. Uncles and aunts, although in the same degree of relationship as such children to the intestate, are excluded from claiming with such children, because they cannot claim otherwise than in their own right.(*l*)

217. Hotchpot.—To bring into hotchpot means to mass the property to be divided. The term corresponds generally with "collation" in Scotch law, with this exception, that in England the heir-at-law is entitled to an equal share of the personal estate with the rest of the children without bringing into hotchpot the value of his real estate; while in Scotland, the heir-at-law has not that privilege. If he claims legitim or a share of the dead's part, he must collate the heritable estate with the rest of the children.(*m*)

218. Advancement.—An advancement is a provision which may (in the shape of land, freehold and copyhold, charges on land, or money) be made by a father (but not by a widow) in his life-

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(*j*) Pat. Comp. p. 250.

(*k*) Williams' Executors, 1151. For rules in Scotch Law, see § 88.

(*l*) Mascall's Digest, p. 78. For rules in Scotch Law, see § 125.

(*m*) Pat. Comp. p. 249. For rules in Scotch Law, see §§ 120-123.

time in favour of his child, by such an act (not being a will) as will completely divest him of the property. The advancement may be complete or partial: complete when it is equal in amount to the share of the intestate's personal estate which the child in question would have been entitled to along with the other children, and partial when it is of less amount than such share. If the child be content with what he has got, he can keep it, however much it exceeds his distributive share; but if not content, he must bring into hotchpot what he before received. A child advanced by a father in his life, or provided for in a will, cannot be called on to bring his share into hotchpot. If such child die in his father's lifetime, leaving children, such children shall not be entitled to their father's distributive share unless they bring in his advancement, since as his representatives they can have no better claim than he would have had if living. A child advanced in part shall bring in his advancement only among the other children: the widow shall not benefit by it.

The heir-at-law does not abate in respect of the land coming to him by descent or otherwise from the intestate, but if he receives an advancement out of the personal estate he must abate for it like the other children.(*n*)

219. Domicile—Is *prima facie* that place where the deceased had his permanent residence.

The following propositions have been deduced by a high authority from the adjudged cases(*o*):—

1. Though a man may have two domiciles for some purposes, he can only have one for the purpose of succession.

2. The original domicile, or, as it is called, the domicile of origin (arising from a man's birth and connections), is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile.

3. The proposition last stated is equally true of an acquired, as of an original domicile. The domicile of origin having been abandoned and a new domicile acquired, the new domicile may be abandoned and a third domicile acquired. But an acquired domicile cannot be lost by mere abandonment, but continues until the intention of another change of domicile is carried into execution.

(*n*) Williams' Executors, 1500. For rules in Scotch Law, see § 111.

(*o*) Williams' Executors, 1517. For rules in Scotch Law, see § 81.

Again, the domicile of origin does not revive until an acquired domicile has been abandoned *animo et facto*.

4. A new domicile cannot be acquired by a party's own act during pupilage, nor until the party is *sui juris*. Accordingly a married woman, though living apart from her husband, has no power to change her domicile.

5. By marriage the domicile of the husband becomes that of the wife, and she retains it after the death of her husband.

6. After the death of the father, children remaining under the care of the mother follow the domicile which she may acquire, and do not retain that which their father had at his death until they are capable of gaining one by acts of their own.

The Act(*p*) regulating the domicile of British subjects dying whilst resident abroad, and foreign subjects dying whilst resident in this country already referred to,(*q*) is applicable to the United Kingdom.

The above propositions might be taken as also deducible from the decided cases in the law of Scotland; and, in illustration of these, reference may be made to the cases noted in the Scotch law on the subject of domicile(*r*).

220. Domicile regulates Distribution.—In England as in Scotland, personal property is distributable according to the law of the country where the deceased was domiciled, but the administration of the estate must be in the country in which possession of it is taken and held under lawful authority.(*s*)

Distribution of Personal Estate.

221. The Law under the Statutes.—The disposal of the personal estate of intestates is regulated by the Statutes 22 & 23 Car. 2 c. 10, 29 Car. 2 c. 3, 1 Jac. 2 c. 17, and 19 & 20 Vict. c. 94.

The Married Women's Property Acts of 1870, 1874, and 1882, while they effect great changes on the status of married women in regard to property, do not appear to take away the former rights of the husband in the event of his wife dying intestate. It would seem that the husband is still entitled to the whole of his wife's personal property on her death intestate, to the exclusion of her

(*p*) 24 & 25 Vict. c. 121.
(*q*) § 82.
(*r*) § 82.
(*s*) Williams' Executors, 1517. For rules in Scotch Law, see § 82.

next-of-kin. The Act of 1882, which consolidates and amends the two former Acts, certainly makes sweeping changes on the common law. In regard to property acquired by her own industry, or given or bequeathed to her by others, it makes a married woman independent of her husband; it gives her the same rights to and powers over it as if she were single. She may carry on any trade or business on her own account, and dispose of the proceeds as she pleases. She may even take up house for herself and live apart from her husband, and her husband will not be able to interfere with her freedom of action without the aid of the Divorce Court. But even that Court will not give the husband any right to touch his wife's property; it will only ordain her to reside with him under the same roof, but it will not compel her to give him any part of her earnings or her property.

The first-mentioned Act, commonly called the Statute of Distribution, is the leading Act in the English succession law.

After providing for caution being found by administrators—*i.e.*, executors-dative—it proceeds (§ 3) to enact that the ordinaries (or Sheriffs) shall have power to call administrators to account, and "to order and make just and equal distribution of what remaineth clear (after all debts, funeral, and just expenses of every sort first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure* according to the laws in such cases, and the rules and limitations herein set forth."

Section 4 provides that the customs of London and York shall not be prejudiced.

Section 5 provides—"That all ordinaries, and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say,—one-third part of the said surplusage to the wife of the intestate, and all the residue, by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribu-

tion is to be made; and in case any child other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid—then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated; but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate."

Section 6 provides—"And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them."

Section 7 provides—"That there be no representations admitted among collaterals after brothers' and sisters' children, and in case there be no wife, then all the said estate to be distributed equally to and amongst the children; and in case there be no child, then to the next-of-kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever."

Section 8 provides that—"To the end that a due regard be had to creditors that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death, and that each and every one to whom any distribution and share shall be allotted shall give bond with sufficient sureties, in the said Courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case, he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator, by reason of such debt, out of the part and share so as aforesaid allotted to him or her thereby to enable the said administrator to pay and satisfy

the said debt or debts so discovered after the distribution made as aforesaid."

Finally, Section 9 enacts that the Act shall not extend to administration with the will annexed.

Such administrations arise under the following circumstances:—

1. If no executor appointed.

2. If the executor appointed has died either before or after the testator.

3. If the executor has renounced, or been cited in Court and has not appeared; or,

4. Where the Court shall use the discretion given to it by the Court of Probate Act, 1857.(*t*)

The 29 Car. 2 c. 3 (Statute of Frauds), § 25, provides that neither the Statute of Distribution nor anything therein contained "shall be construed to extend to the estate of *femme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act."

1 Jac. 2 c. 17, enacts (§ 7) "that if, after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her."

Before this statute was passed if a child had died intestate without a wife, child, or father, his mother succeeded to his whole personal estate.

The Act 19 & 20 Vict. c. 94, abolished the customs of London, the province of York, and certain other places with reference to all persons dying on or after 1st January, 1857.

The following concise and lucid summary of the law is taken from Francis Maxall's excellent "Digest of the Law"(*u*):—

222. "Right of a Widow: General Rule.—If the intestate leave a widow, not barred by jointure, and a descendant or descendants, the widow shall take only a third part of the clear surplus of the personal estate. But if, leaving a widow, he leave no descendant, she shall have a moiety. So that the widow, where there is one, constitutes no class, but partakes with the one entitled, as will be shown in the enumeration of the nine following classes.

(*t*) Coote's Prac. p. 61.

(*u*) Edition 1818.

223. "Right of a Husband (*1st Class*).—The husband of a *femme covert* (unless he have departed with his right thereto) is entitled to his deceased wife's personal estate, and excludes every other person. The husband, therefore, of the following classes or descriptions of persons entitled, constitutes the first; and it is to be observed that every preceding class excludes all the subsequent ones.

224. "Right of a Descendant or Descendants, with or without a Widow of the Intestate (*2nd Class*).—If the intestate leave no husband, but a descendant or descendants, and a widow not barred by jointure, she takes a third, and the descendant or descendants, whether by the same or different wives, the remaining two-thirds, divisible as follows, viz.—of a plurality of children, those who are fully advanced are excluded; those partially advanced must bring their partial advancements into hotchpot. If only some or one of the intestate's children be dead, the children of a deceased child of the intestate take *per stirpes—i.e.*, they take amongst them the share which their parent, if living, would have been entitled to. But if all the children of the intestate be dead, his grandchildren take *per capita,—i.e.*, each grandchild takes an equal share in his own right, as one of the next-of-kin. Such also would be the case with respect to the great-grandchildren of the intestate, if both his children and grandchildren had all died before him. For when all the parents, being descendants of the intestate, are deceased, their children, if equally near to the intestate, take *per capita*, but when some only, they take *per stirpes*. And the right of representation amongst the descendants of the intestate is not confined within any degree, since any descendant, however remote, excludes all ascendants and collaterals.

If the intestate leave neither husband nor widow, but a descendant or descendants, the sole descendant takes the whole; and if there be a plurality of descendants, whether by the same or different wives or husbands, the whole is divisible amongst them, either *per capita* or *per stirpes*, according to the circumstances of the case, those totally advanced being excluded, and partial advancements being brought into hotchpot.

225. "Right of a Father, with or without a Widow of the Intestate (*3rd Class*).—If the intestate leave neither husband nor descendant, but a father, if there be no widow, he takes the

whole; but if there be a widow, not barred by jointure, he take one half, and the widow the other half.

226. "Right of Mother, Brothers, Sisters; the Children of deceased Brothers and Sisters, claiming either by Representation along with a living Brother or Sister, or claiming *quasi* by Representation along with the Intestate's Mother; with or without a Widow of the Intestate (*4th Class*).—If the intestate leave neither husband, descendant, nor father, but a mother, and a brother or brothers, sister or sisters, either of the whole or half-blood, or any child or children of such brother or brothers, sister or sisters, the mother shall take an equal share with each of the surviving brothers and sisters of the intestate, and the child or children of each of such brothers and sisters as are deceased; the child or children of a deceased brother or sister taking the share which the parent, if living, would have taken. And it makes no difference whether all the brothers and sisters of the intestate be dead or not; for if they be dead, still one of the persons entitled—viz., the mother—taking an original share in her own right, the children of the brothers and sisters on that account take *quasi* by representation. The persons constituting this class, if there be a widow, not barred by jointure, take one-half, and she the other. If there be no widow they take the whole. And, amongst collaterals, the right of taking by representation extends no further than to brothers' and sisters' children. Moreover, a grandfather, although he is in an equal degree of consanguinity with the brother of the deceased, shall have no share with the brother in the distribution. This arises from the words in the statute, "*pro suo cuique jure*," letting in the preference of the brother to the grandfather, to which the brother was entitled by law before the statute.

If the intestate leave neither husband, descendant, father, brother, sister, nor any child of a brother or sister, but a mother, if there be a widow not barred by jointure, the mother shall take one-half, and the widow the other; but if there be no widow, the mother shall take the whole.

If the intestate leave neither husband, descendant, father, nor mother, but a brother or brothers, sister or sisters, either of the whole or half blood, if there be no nephew or niece, the brothers and sisters take each of them an equal share; and if there be only one of such persons,—viz., a brother or sister,—such one takes the whole of what is distributable amongst the next-of-kin. But

if, besides a brother or brothers, sister or sisters, there be also any child or children of a deceased brother or sister, or of deceased brothers or sisters, the living brothers and sisters take equally with the children of the deceased brother or sister, who take by representation the share which their parent, if living, would have taken. This fourth class, if there be a widow not barred by jointure, takes one-half, and she the other; if there be no widow, it takes the whole.

"In every other class but this fourth, any one person who ranks as a claimant in it may, in the absence of the others, be the only person entitled. This class may also consist of a single person, where that person is either a mother, sister, or brother of the intestate. But it differs from every other in this particular, that a description of persons—viz., the children of deceased brothers or sisters—may be entitled to rank in this class, when there is any one of the other three descriptions of persons who always rank in it (viz., a mother, sister, or brother), along with whom they may claim; but without whom they must be postponed to the fifth class, and rank in the sixth. For the child of a deceased brother or sister of the intestate cannot claim in the fourth class, except by representation, along with a brother or sister of the intestate; or *quasi* by representation along with the mother of the intestate. So that a person,—viz., a child of a deceased brother or sister,—although he may, under certain circumstances, be a claimant, can never, in any circumstances, be the sole claimant in the fourth class.

227. "Right of Grandfathers, or, if they be dead, Grandmothers, with or without a Widow of the Intestate (*5th Class*).—If the intestate leave neither husband, descendant, father, mother, brother, nor sister, but a grandfather or grandfathers (or, if one or both of the grandfathers be dead, a grandmother or grandmothers), if there be a widow not barred by jointure, the grandfather or grandfathers shall take one-half, and the widow the other; but if there be no widow, the grandfather or grandfathers shall take the whole, and exclude nephews and nieces claiming in their own right. For, there being no brother or sister living, nephews and nieces cannot claim by representation; and, the mother being also dead, they cannot claim *quasi* by representation, but only as of kin in the third degree in their own right. Uncles, it may be observed, are also in the third degree, and are equally entitled with nephews and nieces claiming in their

own right; but as the grandfather, who is in the second degree, excludes uncles, who are in the third, so also shall he exclude nephews and nieces claiming in their own right, who are, when they so claim, entitled only in respect of that degree of proximity in which they themselves are related to the intestate.

228. "**Right of Ascendants and Collaterals in the Third Degree, including Nephews and Nieces claiming in their own right (that is, where there is neither a Brother nor a Sister of the Intestate to give them a claim by representation, nor a Mother of the Intestate to entitle them to claim *quasi* by representation), with or without a Widow of the Intestate** (*6th Class*).—If the intestate leave neither husband, descendant, father, mother, brother, sister, grandfather, nor grandmother, then the great-grandfather or great-grandfathers (or, if the great-grandfather or great-grandfathers be dead, then the great-grandmother or great-grandmothers), uncles, aunts, and nephews and nieces, claiming in their own right (who are all in the third degree), take *per capita*—that is, each an equal share in his or her own right. If there be a widow, not barred by jointure, they take one-half of the clear surplus, and she the other; if there be no widow, they take the whole. And it is to be remembered, that dignity of blood is immaterial, the preference of males to females having no place in the distribution of the personal estates of intestates, since the females of any one class take equally with the males of the same class, even though such females be the descendants of female kindred of the intestate.

229. "**Right of Ascendants and Collaterals in the Fourth Degree, with or without a Widow of the Intestate** (*7th Class*).—If the intestate leave neither husband, descendant, father, mother, brother, sister, grandfather, grandmother, great-grandfather, great-grandmother, uncle, aunt, nephew, nor niece (the ascendants and collaterals in the third degree of consanguinity, and also all claimants, prior to them, being thus extinct), recourse must be had to the ascendants and collaterals in the fourth degree, —viz., great-great-grandfathers (or, if they be dead, great-great-grandmothers), great-uncles, great-aunts, first cousins, great-nephews, and great-nieces; of whom, as many as are living, take *per capita*—*i.e.*, each an equal share in his own right. If there be a widow not barred by jointure, they take one-half, and she the other; if there be no widow, they take the whole.

230. "**Right of the Next-of-Kin** (*i.e.*, **the nearest of consanguinity), in whatever degree they may be found, with or without a Widow of the Intestate** (*8th Class*).—If all the above seven classes be extinct, recourse must be had to ascendants and collaterals successively in the fifth, sixth, seventh degree, &c., proceeding to that class in which the intestate's next-of-kin, if he have any, shall first be found, observing that whether there be one person only, or a plurality of persons of a previous class, such one, or such plurality of persons, will exclude all those who are of a subsequent class; the next-of-kin, if there be a widow, not barred by jointure, taking one-half of the clear surplus, and she the other; but if there be no widow, they take the whole.

231. "**Right of the Queen, with or without a Widow of the Intestate** (*9th Class*).—If a person of legitimate birth die intestate, without next-of-kin, and leave no widow, the Queen, as *ultimus hæres*, being entitled to what would otherwise have gone to the next-of-kin, will, in this case, take the whole of the intestate's personal estate, subject to his debts.

"If a bastard die intestate, without issue, and not leaving a widow, the Queen, as *ultimus hæres*, being entitled to what would otherwise have gone to the next-of-kin, will also in this case take the whole of the intestate's personal estate, subject to his debts.

232. "**To whom Court will grant Administration.**—If the intestate has died a bachelor, or a widower without issue, his father has exclusive right to administration notwithstanding the deceased has left a mother. The father would thus seem to be considered the sole next-of-kin of the intestate.

"The widow of the intestate takes administration in preference to the children or next-of-kin, unless the latter establish such a case of unfitness on her part as to induce the Court (in exercise of the discretion given to it by 21 Hen. 8 c. 5, § 3) to exclude her.

"If the intestate has left no widow, the intestate's children, or some or one of them, take the grant. They do so likewise if there is a widow who renounces, has died since the decease of the intestate, or is excluded by the Court in the exercise of its discretion, as I have just stated.

"The husband takes administration to his wife, *jure mariti*, by the common law, and his right to the administration of her personal property *qua* husband is recognised and declared by 29 Car. 2, c. 3, § 25, and 1 Jac. 2, c. 17, § 5.

"Administration of a wife's estate will be granted to her next-of-kin upon the husband's renunciation and consent.

"If the husband of the intestate has survived her, but has died without having taken administration, the Court, on the ground of his interest, will grant administration to his legal personal representative, and not to her next-of-kin.

"But this rule being founded on the assumption that the beneficial interest vested in the husband, and devolved to his representative, and on the principle that the grant ought to follow the interest, is liable to be departed from in cases where it can be shown that the beneficial interest did not survive his life, and that the wife's separate property has, upon his decease, by the terms of the instrument constituting it, reverted to her own family.

"Another exception by which a husband's representative is passed over, has been made in cases where the 33rd Section of the Wills Act applies.

"Where a daughter who had a legacy under her father's will died in his lifetime, leaving issue, and also her husband surviving, but who afterwards died likewise in the father's lifetime, the Court gave administration to a son of the daughter (the legatee), without requiring the renunciation or consent of the husband's representative.

"If the intestate has left neither widow, husband, father, nor children, the next-of-kin take administration.

"Those persons only are to be ranked as next-of-kin of an intestate who were such at the time of the intestate's death.

"If the widow renounce or has died since the decease of the intestate, or has been excluded by the Court in the exercise of its discretion, administration will be granted to the next-of-kin of the intestate.

"If the husband renounce and consent, administration will be granted to the next-of-kin of the intestate.

"If the intestate be a divorced woman, her next-of-kin take administration of her estate.

"The Court will grant administration to a stranger nominated by all the next-of-kin, but only if there be special circumstances to justify the grant—viz., under 20 & 21 Vict. c. 97, § 73.

"The Court gives administration to the husband of a sole next-of-kin, being the sole person entitled to the estate, on her renouncing or being cited and not appearing to the process. But if there be other next-of-kin, they must also renounce or refuse.

"The wife's preference of another person, although he be a creditor, will in no way prejudice the husband's right to administer as the next person entitled after his wife, if he be willing to do so.

"*En resumè* it may be said that administration is granted to—

"1. Husband or wife.
"2. Child or children.
"3. Grandchild or grandchildren.
"4. Great grandchildren or other descendants.
"5. Father.
"6. Mother.
"7. Brothers and sisters.
"8. Grandfathers or grandmothers.
"9. Nephews and nieces, uncles, aunts, great-grandfathers or great-grandmothers.
"10. Great-nephews, great-nieces, cousins-german, great-uncles great-aunts, great-grandfather's father, and so on according to the proximity of kindred; all those who are in the same degree being equally entitled."(*v*)

If the widow and all the next-of-kin of an intestate, and all persons entitled to share with them in distribution renounce, a creditor is competent to take administration.

"In intestacy it has been shown that the next-of-kin, under the Statute of 21 Hen. VIII. c. 5, have a preference over descendants and collaterals to whom the Statutes of Distributions have given a share in the intestate's estate, the Court granting administration only to persons entitled in distribution to the estate of a deceased person, where the Statute of Hen. VIII. does not operate by reason of the death or renunciation of the next-of-kin.

"A next-of-kin has priority over the representation of a deceased next-of-kin.

"The attorney of a next-of-kin has priority over a person entitled in distribution.

"A person entitled in distribution has a preference over the representative of a next-of-kin.

"A next-of-kin, or a person entitled in distribution, takes priority of creditors.

(*v*) Coote's Prac. pp. 104-107.

"The guardian of a next-of-kin is entitled in preference to creditors.

"A testamentary guardian has a prior right to all other guardians.

"To enable any person having the inferior interest to take administration (will), or mere administration, all persons having priority must have first renounced or waived their rights, or having been cited, must have neglected by their non-appearance to avail themselves of such rights.

"If a person has two interests, a superior and an inferior one (*e.g.*, being an executor and residuary legatee *conjunctim*), the Court will not permit him to elect to take the grant in the inferior character.

"So a next-of-kin, who is a creditor, must administer in his first-mentioned quality.

"The applicant for administration must depone to his qualification or interest, and give bond of caution with sureties for the proper administration of the estate."(*w*)

233. The Sealing in England of a Scotch Confirmation.—As we have already seen,(*x*) confirmations are rendered operative in England by resealing, and *vice versa.*

The English Court will also reseal an eik or additional confirmation, including further property in Scotland, provided English property, as well as Scotch, has been set out in the original inventory, but not where no English property has been set out in the original inventory.(*y*)

The practice in resealing is this:

A copy of the confirmation is made to be deposited in the registry.

A fee stamp of 1s. is exacted on the receipt of the documents.

In respect of collating the copy, the following fee-stamps are chargeable—

If 10 folios of 90 words each or under, 2s. 6d.

If above 10 folios of 90 words each, per folio, 3d.

(*w*) Coote's Prac. p. 214.

(*x*) § 191.

(*y*) Coote's Prac. 184. See §§ 191, 192, *supra.* The practice here has been slightly altered by 39 & 40 Vict. c. 70, § 42, it being now competent to seal an additional confirmation in England, whether the original confirmation shall have been sealed or not, and although the additional inventory confirmed shall not contain any Scotch estate.

A fee of 2s. 6d. is charged for filing the copy.

The Commissioners of Inland Revenue will transmit a certificate to the Registrar after the confirmation has been duly stamped, or they have been satisfied that no further duty is payable.

In respect of this certificate the practitioner will provide a fee stamp of 2s. 6d.

In the case of an intestacy, the practitioner will also have to file the certificate which he has obtained from the Sheriff or Commissary-Clerk that security has been given to the extent of the personal estate in England.

Search-stamps are charged when necessary, as in the case of a grant, and the usual fee stamp is charged for the receipt of the document. No search-stamps are paid except in cases where the original grant issued from a diocesan, archidiaconal, or any Court other than the prerogative Court of Canterbury.

A certified copy of the Sheriff or Commissary's interlocutor is filed.

A fee-stamp of 2s. 6d. is charged on it.

After the copy of the confirmation, and the certified copy of the interlocutor have been filed with the examiner, and have by him been transferred to the Clerk of the Seat, a fiat allowing or directing the confirmation to be resealed is then prepared by the Clerk of the Seat, and signed by one of the registrars.

In respect of this a fee-stamp of 21s. is charged.(*z*)

(*z*) Coote's Prac. p. 270. Confirmations, where gross value of estate does not exceed £300, shall now be sealed in England, on the same being sent to the Registrar there by the Sheriff or Commissary-Clerk in Scotland, enclosing a fee of 2s. 6d.; 38 & 39 Vict. c. 41, and 39 & 40 Vict. c. 24, as amended by 44 Vict. c. 12, § 34.

INTESTATE SUCCESSION

IN

HERITABLE ESTATE IN SCOTLAND.

234. General View.—The leading general rules under this branch may be stated thus:—

1. That the lineal descendants of the intestate, to the remotest degree, exclude all other relatives.
2. That the collaterals of the intestate and their lawful issue succeed after lineal descendants.
3. That on the failure of collaterals and their issue, ascendants succeed.(*a*)
4. That males exclude females in the same degree of relationship.(*b*)
5. That where two or more males are in the same degree, this distinction obtains: If in the descending line, the eldest only shall succeed, but if in the collateral line, the next younger, or if there be no younger, the next elder male, shall succeed to the exclusion of the other or others.(*bb*)
6. That where two or more females in the same degree are the nearest heirs, they succeed equally, excepting that the eldest is entitled to certain indivisible rights.(*c*)
7. That the doctrine of representation is not, as in moveable succession, confined to lineal descendants and to brothers and sisters and their descendants, but extends to ascendants and their descendants without limitation.(*d*)

These rules may be briefly illustrated in this way: If the intestate leave two sons, A and B, and two daughters, C and D, the eldest son A excludes B under Rule 5, and he excludes C and D under Rule 4, even although C and D should be his seniors in years. If, however, A die without issue, then B succeeds under Rule 4, to the exclusion of C and D; if B also die without issue, C and D succeed equally under Rule 6. But if A or B leave a son or daughter, or a grandson or granddaughter, such son or daughter or grandson or granddaughter excludes B and C and D under Rule 7.

(*a*) See § 259.
(*b*) See § 246.
(*bb*) See § 253.
(*c*) See § 247.
(*d*) See § 245.

8. That the full or german blood exclude the half-blood consanguinean, the half-blood consanguinean succeed after the full blood, while the half-blood uterine is entirely excluded.(*e*)

9. That the husband and wife never succeed to one another; but in certain circumstances, the husband, if he survive his wife, is entitled to a liferent of any heritable estate she may possess, called his right of courtesy,(*f*) while, if the wife survive her husband, she is entitled to the liferent of part of any heritable estate vested in the husband at his death, called terce.(*g*)

235. Heritable Property: what Term comprises.—In questions of succession it is of importance that the lines which separate property into heritable and moveable be clearly distinguished, as the things which are deemed heritable go to the heir in heritage; while the things which are deemed moveable go to the next-of-kin or legal representatives of the intestate.

The leading rules which govern the separation of property into heritable and moveable having been already considered (*h*); it will be sufficient here to state in general terms the nature of the rights regarded as heritable property.

As a general rule, all things which are in their nature immoveable, as land and houses, and all rights in or connected with either, are heritable.

Like moveable property, heritable property is divided into rights corporeal and incorporeal; and in both divisions, a thing may be heritable either (1) by its nature; or (2) by its accession to or connection with other things; or (3) by the destination impressed on it.

These divisions may be briefly illustrated thus:—

I. *Corporeal Heritable Rights.*

(1.) By nature all things incapable of being moved are heritable, as land and all minerals and substances therein.

(2.) By accession or connection, things, though in themselves by nature moveable, may become heritable. Thus, things annexed to land artificially, so that they cannot be removed without

(*e*) See §§ 254, 255.
(*f*) See § 264.
(*g*) See § 261.
(*h*) § 83.

destroying or changing the nature of the other subject, as houses, fixtures in houses,(*i*) mills, machines or vessels immoveable or fixed, &c., are heritable. So also are trees, natural fruits, and all crops, which are not annual, so long as attached to the soil; also second crops of hay from seed sown.(*j*)

(3.) By destination, things in their nature moveable may be rendered heritable, and that either by express words, or by using them in such a way as to show a manifest purpose of annexation or connection. Thus, jewels, arms, pictures, books, or furniture, may be made heritable by destination; while materials prepared for completing the wainscoting or windows of a house, or the like, are made heritable by annexation.(*k*)

II. *Incorporeal Heritable Rights.*

(1.) By their natural character, all rights to land, whether of property or of liferent, made real by registration, are heritable. So also are rights having a tract of future time as liferents, annuities, titles of honour, and offices to continue after the patentee or officer's life.(*l*)

(2.) By accession or connection, feu-duties and casualties of superiority, rents of land, &c.,(*m*) are heritable, though arrears be moveable. So also are rights affecting land, though not feudalised, as servitudes, teinds, reversions, &c.(*n*)

(3.) By destination, the exclusion of executors in a personal bond makes the bond heritable.(*o*) So also in a heritable bond; but although not so conceived, such a bond is heritable *quoad fiscum*, the husband's *jus mariti*, the *jus relictæ*, and the children's *legitim*.(*p*)

236. Conquest Heritage.—This term was at one time applied to such heritable subjects as were acquired by industry, economy, purchase or donation, or by what was technically called "singular title." It was used in contradistinction to such heritable rights as the deceased inherited from his father or other relative, termed heritage.(*q*) The distinction between the two fees was abolished

(*i*) See § 83 as to the rules regulating the law of fixtures.

(*j*) M'Laren, § 369; Bell's Prin. § 1473.

(*k*) Bell's Prin. § 1475; *Bailie*, 21st May, 1859, 21 D. 838.

(*l*) Bell's Prin. §§ 1476-81.

(*m*) § 124.

(*n*) Bell's Prin. § 1484; *Capledræ*, 15th March, 1878, 15 S. L. R. 440.

(*o*) Ersk. 2, 12, 2.

(*p*) 31 & 32 Vict. c. 101, § 117.

(*q*) Bell's Prin. § 1672; Ersk. 3, 8, 14.

by the Conveyancing Act of 1874,(*r*) with respect to all successions opening after 1st October, 1874, and it was by that Act provided that, thereafter, fees of conquest should descend to the same persons, in the same manner, and subject to the same rules as fees of heritage.

Conquest did not include leases, annuities, pensions or personal bonds excluding executors, as these do not require sasine, nor teinds, as teinds affect the fruit, not the land.(*s*) But conquest heritage did not long continue to be conquest. So soon as the heir in conquest completed his title to the property, it became heritage proper in his person,(*t*) and consequently, on his death intestate, descended in the same way as heritage proper. But if the heir died without having completed his title, the succession passed to the ancestor's next heir of conquest.(*u*)

237. Heirship Moveables.—Formerly the heir-at-law could, on succeeding to heritable property, claim certain moveables called heirship, which usually consisted of select articles of household furniture, implements of husbandry, farm stock, &c. But, as already noticed, the right was taken away by the Conveyancing Act, 1868.(*v*)

238. Lines in Consanguinity.—These lines are the same as those already mentioned in treating of Moveable Succession.(*w*)

239. Opening and Vesting of Successions.—The circumstances under which successions in heritable estate open and vest are the same as those in Moveable Successions, to which the reader is referred.(*x*)

240. Rights of Aliens.—Aliens, as already explained, are now entitled to acquire, hold and transmit heritable property within the United Kingdom, and they possess nearly all the privileges of British subjects.(*y*)

241. Collation.—This is a privilege the heir may claim where he finds that the moveable estate is of more value than the heritage.

(*r*) 38 & 39 Vict. c. 94, § 37.
(*s*) Ersk. 3, 8, 16.
(*t*) Bell's Prin. §§ 1675, 1676.
(*u*) *Aitchison*, 7th March, 1829, 7 S. 558.
(*v*) 31 & 32 Vict. c. 101, § 160; see also §§ 31, 51, 73, 237.
(*w*) §§ 84, 88.
(*x*) § 80.
(*y*) § 127.

In such a case he is entitled to require that the heritage and moveables be massed into a common fund, from which he may draw a share equal with each of the next-of-kin. The heirs entitled to this privilege, as well as the subjects of collation, and the mode of collation, have been already explained.(*z*)

242. Kinds of Heirs.—The expressions, "heir," "heir-at-law," "heir-of-line," "heir-general," and "heir whomsoever or whatsoever," of any person are synonymous, and point out the person succeeding in the regular course of law to property undestined by the ancestor. The person succeeding is called "heir-at-law," because he succeeds by the operation of law; "heir-of-line," because he succeeds in a certain recognised line of propinquity; "heir-general," because he may enter by a general service, as nearest and lawful heir to the ancestor whom he represents generally; and "heir whomsoever or whatsoever," in contradistinction to special heir, called by particular destination. The term "heir-male" applies to a male connected through males; and the term "heir-female" applies to that female and her heirs (whether male or female), who is most nearly connected with the ancestor. "Heir-apparent" applies to the person to whom a succession has opened, but who has not completed his title to it; before the succession has opened such person is called "heir-presumptive."(*a*)

243. Heirs must be Legitimate.—The heir must be legitimate at the time he succeeds to heritage. Illegitimate children do not succeed at common law, even to their own father or mother, as succession is through the father only, and illegitimate children have, in the eye of the law, no father.(*b*)

244. Heirs-descent: how traced.—In every case the heirs-descent must be traced from the person, male or female, who died last vested in, or held an unrecorded disposition to the property, irrespective of the manner in which that person acquired the property.(*c*) Estates now vest in heirs without service.(*d*)

245. Right of Representation.—In case of remote issue, the succession is regulated by the law of representation, which has a

(*z*) §§ 120, 123.

(*a*) Ersk. 3, 8, 54; Bell's Prin. § 1677. See also §§ 21, 28.

(*b*) Ersk. 1, 6, 51; Bell's Prin. §§ 2063, 1627. See how this rule now affected in moveable succession, § 126.

(*c*) Bell's Prin. §§ 1663, 1671.

(*d*) 37 & 38 Vict. c. 94, § 9.

wider application in heritage than in moveables.(*e*) In moveables the right is not admitted beyond brothers and sisters of the intestate and their descendants; but in heritage there is no such limitation—it extends universally among all heirs.

The law comes into operation where a person predeceases the intestate, who, had he survived, would have been heir, in which case his sons and daughters represent him, and, in their legal order as stated below,(*f*) take that share which, if alive, each would have taken, to the exclusion of heirs in the line in which their parent stood.(*g*) Thus, if a person die intestate leaving sons and daughters, and a grandchild by a deceased eldest son, such grandchild, although a female, will, as representing her father, who would have succeeded had he lived, take the heritage, to the exclusion of all her uncles and aunts. So, also, if there be daughters only, and a granddaughter by a deceased son, the youngest of the family, his daughter will exclude all her aunts; because she represents her father, who, had he lived, would have succeeded to the exclusion of his sisters. In like manner, if there be more grandchildren than one by the child predeceased, they take the heritage in the same way as children of the intestate would have done.

246. Succession of Males.—The male children are first in the order of succession in heritage; they, and their issue, succeed according to seniority; from eldest son to eldest son, and when the eldest son dies without leaving issue, the second son succeeds, and so on with the other sons.(*h*)

247. Succession of Females failing Males.—Failing males, the succession opens to females, of whatever marriage, in the same degree, called heirs-portioners, and who take, not in order of seniority, but all together, and each heir-portioner on her death intestate transmits her own share to her heir-at-law.(*i*)

The eldest heir-portioner by legal succession has a preferable right to things of an indivisible nature, as offices, dignities, superiorities, the custody of family manuscripts, title-deeds, &c.(*j*);

(*e*) See rules in moveables, § 125; see also § 46.

(*f*) § 259.

(*g*) Bell's Prin. § 1660; Ersk. 3, 8, 11.

(*h*) Bell's Prin. § 1665; Ersk. 3, 8, 6.

(*i*) M'Laren, § 127; Bell's Prin. § 1659.

(*j*) *Cowie*, 26th Feb. 1707.

also to the principal country mansion-house, garden, yard, and offices, as a *præcipuum* without compensation to her sisters.(*k*)

This right is distinct from the right of heirship moveables. The right to heirship moveables, which is now abolished,(*l*) came into operation in questions between the heir and next-of-kin, while the right of *præcipuum* arises only between heirs-portioners.

Any of the heirs-portioners may insist on having the succession divided by the Sheriff and a jury, under a brieve of division,(*m*) and in such division the eldest is entitled to the portion next the mansion-house; the others cast lots for their choice.(*n*)

248. Succession of Issue of deceased Females.—The issue of each daughter predeceasing the intestate take their mother's place, first sons in their order, then daughters equally. *E.g.*, if the intestate had three daughters, A, B, C, and C had died before him, leaving grandsons and granddaughters, the eldest grandson, as his mother's heir-at-law, would succeed to her share of the intestate's heritage, to the exclusion of his brothers and sisters; or, in the same case, if C died, leaving daughters only, they would succeed as heirs-portioners to their mother's share of their grandfather's succession. Again, if all the three daughters had died before their father, and all had left issue, the division would be into three parts in the same manner as if the three had survived their father; the male issue of each daughter taking in their order of seniority, and, failing males, then females equally as heirs-portioners.(*o*)

249. Mother of Intestate and her Relatives.—The mother of the intestate and her relatives never succeed in any contingency; even the mother's own estate, as will be afterwards noticed,(*p*) after vesting in her son or daughter, never ascends to the maternal line again.(*q*)

250. The Succession of a Husband where he Dies—

1. *Survived by a Wife and One Child.*—In this case the child takes the whole heritage, subject to his mother's liferent

(*k*) See §§ 26, 48.
(*l*) 31 & 32 Vict. c. 101, § 160.
(*m*) 1 Jur. Styles, 4th Ed. 330; M'Laren, § 150.
(*n*) Stair, 4, 3, 12.
(*o*) Ersk. 3, 8, 13; Bell's Prin. § 1659.
(*p*) § 255.
(*q*) Bell's Prin. § 1669; Ersk. 3, 8, 9. See also § 22.

of one-third of the property, called her terce, unless she had renounced her right to terce in a contract of marriage or otherwise, in which case the child would take the whole heritage freed of the terce.(*r*)

2. *Survived by Wife, Sons and Daughters.*—The eldest son takes the whole heritage, subject to terce as aforesaid, to the exclusion of his younger brothers and all his sisters. He will succeed though he be the son of a second or a third marriage, if there be daughters only of the first or second marriage, and it makes no difference whether the property belonged originally to his father or mother.

   If the eldest son have predeceased the intestate, leaving children, the law of representation comes into operation,(*s*) by which the intestate's grandson or granddaughters, as the case may be, would take the heritage, to the exclusion of his or their uncles and aunts.

   If the heir be also one of the next-of-kin, he has the privilege of asking that the heritage be massed with the moveable property, in order that he may get an equal share of the aggregate with the rest of the next-of-kin.(*t*)

3. *Survived by Wife and Sons but no Daughters.*—Subject to the burden of terce, the sons will take one by one and their respective issue in the legal order stated below.(*u*)

4. *Survived by Wife and Daughters but no Son.*—Subject to the burden of terce, the daughters will take *not seriatim*, as in the case of males, but equally as heirs-portioners; and, if any have predeceased the intestate, the issue of the predeceaser will take the share which would have fallen to their mother.(*v*)

5. *Survived by Wife without Children.*—The wife takes her terce, but nothing more, the residue of the heritage goes to the husband's heir-at-law—males in their order, and then females in the same degree equally.(*w*)

6. *Predeceased by Wife leaving Children.*—Where the wife has predeceased her husband, the right to terce is not claimable by any person on her behalf, but is extinguished by her

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(*r*) See §§ 261, 263.
(*s*) § 245.
(*t*) See §§ 120-23.
(*u*) § 259.
(*v*) See §§ 26, 48.
(*w*) §§ 261-3.

death, and if no prior terce is claimable, the heir-at-law takes the whole heritage freed of terce.

7. *Predeceased by Wife without Children.*—The heir-at-law takes the whole heritage in manner explained above.

251. The Succession of a Wife where she dies possessed of heritable property in her own right—

1. *Survived by Husband and Child or Children.*—If father of the heir-at-law, the husband is entitled to a liferent of the property called his right of courtesy.(*x*) Subject to such liferent, the eldest son or the daughters, according to the rules already explained, take up the succession.
2. *Survived by Husband without Children.*—The husband is not entitled to a right of courtesy, and the wife's heritage therefore goes to her own heir-at-law.(*y*)
3. *Predeceased by Husband leaving Children.*—The males take in the order already explained, and failing males, the females take equally.(*z*)
4. *Predeceased by Husband without Children.*—The property descends to her own heir-at-law in the manner hereafter explained.(*a*)

252. Where Intestate is Survived by Grandchildren only.—If the children of the intestate have all predeceased him, by the law of representation the children of the eldest son, whether male or female, exclude all the other grandchildren, and the children of a younger son even exclude all the grandchildren of daughters; males taking first, then females in the same degree equally.(*b*)

253. Where Intestate is Survived by Brothers- or Sisters-german only.—If the intestate be survived by no descendant of his own, either male or female, the succession opens to the collateral relations by the full blood.(*c*) The general rule in this line is that the succession, in the first place, descends as far as possible, and then gradually ascends. So, among brothers and sisters of the intestate, his immediate younger brother succeeds first, or if he be dead, but have left children, these children are entitled to succeed by the law of representation, first, sons in their order, and then

(*x*) §§ 264-6.
(*y*) See rules in § 259.
(*z*) §§ 246, 247.
(*a*) § 259.
(*b*) § 259.
(*c*) See § 85.

daughters equally, as formerly explained.(*d*) If the immediate younger brother have died without leaving children, the succession devolves upon the next younger brother or his issue, in the order already stated,(*e*) and so on through the whole line of brothers.

If the intestate were the youngest of the sons, the succession would be in inverse order, the immediate elder brother or his issue in the said order, would take first; after them the next elder brother or his issue in the said order, and so on upwards in the ascending line.

If the intestate had no brothers, or all his brothers had predeceased him without leaving issue, the succession would devolve upon his sisters, who would all take equally as in the case of daughters succeeding to a father, and the issue of any deceased sister would take the share which would have fallen to their mother.(*f*)

254. Where the Intestate is Survived by Brothers- or Sisters-consanguinean only.—Where there are no brothers or sisters by the full blood, or any issue of them, then brothers or sisters consanguinean—*i.e.*, by the same father but not the same mother, or their issue, succeed, and the rules of preference as to age and sex are the same with those applicable to relations by the full blood. But the full blood always excludes the half blood. So, if the intestate left a sister by the full blood, and a brother by the same father but a different mother, the sister would be preferred. If the consanguinean relations are issue of a former marriage, the youngest brother succeeds first, and gradually upwards; if, of a subsequent marriage, the eldest succeeds first and gradually downwards.(*g*)

255. Where the Intestate is Survived by Brothers- or Sisters-uterine only.—Brothers- or sisters-uterine—*i.e.*, of the same mother but not the same father, never succeed in any event to their full blood or consanguinean relations, nor *vice versa*.(*h*)

In certain cases, this rule operates very harshly and unjustly. For instance, where a mother vested in a heritable estate has been twice married, and leaves a son by each marriage, if the son of the first marriage takes up the estate and dies without issue, the heir-

(*d*) § 245.
(*e*) § 246.
(*f*) §§ 26, 48.
(*g*) Bell's Prin. § 1665.
(*h*) Bell's Prin. § 1655. See also § 22.

at-law of the first son will take up the succession to the exclusion of the mother's own second son.(*i*) The heir-at-law of the first son may be an uncle or a great-grandfather, or may even be found removed almost beyond identification in the ascending lines of succession, and yet such person will legally exclude the lawful son of the mother to whom the estate originally belonged, and if no such heir can be traced, the Crown even will take in preference to the mother's second son.

256. Where the Intestate is Survived by no Descendant or Collateral Relative.—On the failure of descendants, and brothers and sisters and their descendants, the succession goes to the father, or if he be dead, to *his* brothers and sisters (uncles of the intestate) and their descendants in the same order as the brothers and sisters of the intestate and their issue take. Failing uncles, aunts succeed equally, and their issue in the manner already explained, with regard to sisters of the intestate.(*j*)

If there be no uncle or aunt, or any descendant of an uncle or aunt, the succession opens to the grandfather of the intestate and to *his* collateral relations; and failing all these, it goes to the issue of remoter ascendants.

257. Order of Succession in Conquest.—As already mentioned,(*k*) the distinction between conquest heritage and heritage proper has now been abolished, but as the Act is not retrospective in its operation, the old law still applies to all successions in conquest property which opened before 1st October, 1874, being the date of the commencement of the Act.

Excepting in the branches collateral to the intestate and to the intestate's father, the order of succession in conquest was the same as it is in heritage. The only divergence took place in these two lines, and the rule in conquest was that failing children and their issue, the immediate *elder* (instead of the immediate younger as in heritage) succeeded, and failing him and his issue, the next immediate elder, and so on to the eldest, each transmitting to his issue male and female in their legal order as he succeeded. If there were only younger brothers, the immediate younger succeeded though he should also have taken the heritage to which the intestate had himself succeeded. Failing brothers and their issue, sisters

(*i*) Ersk. 3, 8, 10.
(*j*) § 253.
(*k*) § 236.

whether elder or younger than the intestate, succeeded; failing sisters and their issue, the father succeeded; and failing the father, his brothers (the intestate's uncles) succeeded; failing uncles and their issue, aunts succeeded equally.(*l*)

It will thus be observed that the distinction between heritage and conquest arose only where a middle brother or sister or their issue died without issue surviving him or her. Conquest became heritage after the heir of conquest died, if he had made up titles to the property; so that, if an immediate elder brother succeeded as heir of conquest, and died without issue, his immediate younger brother succeeded.

The distinction between heritage and conquest did not arise where sisters succeeded as heirs-portioners, as they took the property equally.

258. Order of Succession not affected by Tenure of Property.—Although heritable property is split up into two or more parallel estates belonging to different persons who stand to each other in the relation of superior and vassal, these splits do not affect the legal order of succession excepting only, if it can be considered an exception, that formerly newly acquired property if feudalised, went to the heir of conquest, while, if *not* feudalised, it went to the heir-at-law.(*m*)

259. Abstract of the Order of Succession in Heritage.—Having now shown somewhat in detail the governing rules in heritable succession, it may be useful to show in an abstract form the operation of these rules in the three lines of succession. Thus:—

I. DESCENDANTS:—

1. The intestate's eldest son, to the exclusion of all the other sons.

(1.) His eldest son and issue, sons in order of seniority with their respective issue, and then daughters equally, as heir-portioners, with their respective issue; first, males in their order, then females equally.

(*l*) See § 25, 32, 49, 50.
(*m*) M'Laren, § 65; Bell's Prin. § 1676, *et seq.*

(2.) His second son and issue, sons in order of seniority, and daughters equally, as above; and so on till sons are exhausted.

(3.) His daughters equally.

2. The intestate's second son, to the exclusion of the other sons.

(1.) His eldest son and issue as above.

(2.) His second son and issue, as above; and so on till exhaustion of sons.

(3.) His daughters equally.

3. The intestate's third son, with his issue as above; and so on in succession to the other sons in the order of seniority, with issue as above.

4. The intestate's daughters, of whatever marriage, inherit *pro indiviso* as heirs-portioners—the issue of each daughter who has died taking their mother's place; first sons in their order to the exclusion of the rest, then daughters equally, as heirs-portioners.

II. COLLATERALS:—

Failing descendants, the brothers and sisters of the intestate succeed thus:(*n*)

5. The brothers succeed each by himself with his issue; males in the order of seniority, and females equally as above. If younger than the intestate the brothers take in the order of seniority; if elder, then in inverse order.

6. The sisters as heirs-portioners, the issue of each deceased sister succeeding as stated in No. 4.

7. The brothers consanguinean, each by himself with his issue in the order stated in No. 5.

8. The sisters consanguinean equally—the issue of each deceased sister succeeding as stated in No. 4.

III. ASCENDANTS:—

Upon the failure of descendants and collaterals, the paternal ancestors succeed thus:(*o*)

9. The intestate's father.

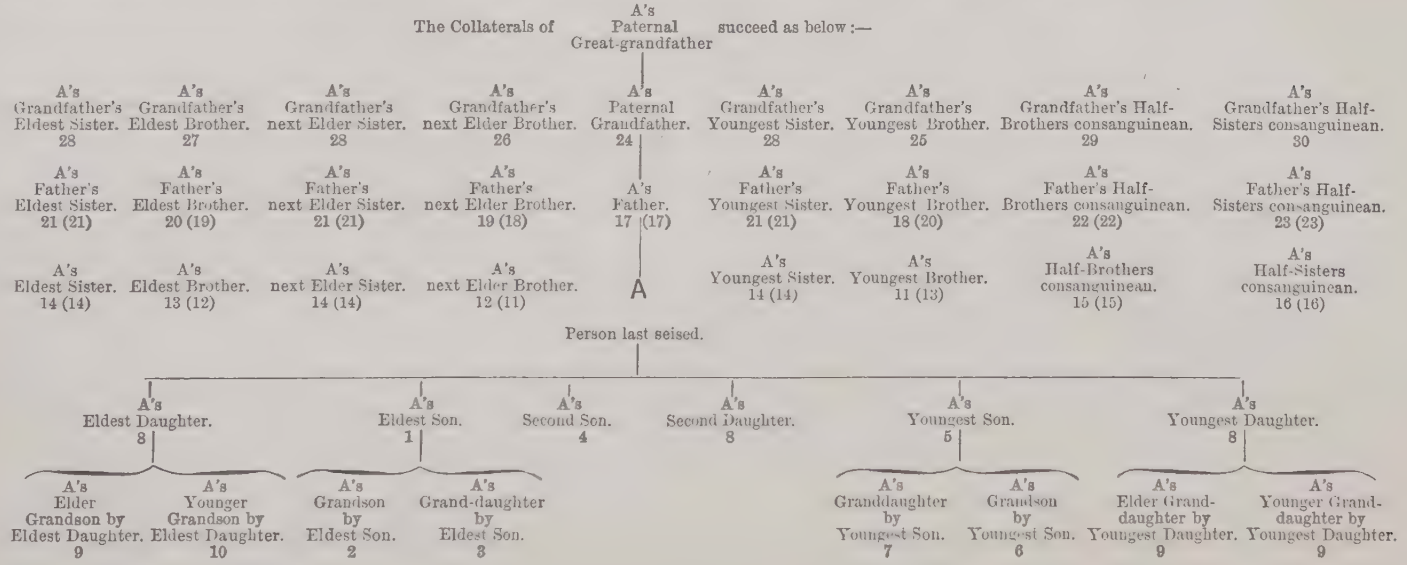
(*n*) Bell's Prin. 1661-1665; Ersk. 3, 8, 8.

(*o*) Bell's Prin. §§ 1666, 1667; Ersk. 3, 8 8.

10. The intestate's uncles, each by himself with his issue, in the order stated in No. 5.
11. The intestate's aunts equally—the issue of each deceased aunt succeeding as stated in No. 4.
12. The intestate's uncles consanguinean, each by himself with his issue, in the order stated in No. 5.
13. The intestate's aunts consanguinean equally,—the issue of each deceased aunt succeeding as stated in No. 4.
14. The intestate's paternal grandfather.
15. The brothers of the intestate's paternal grandfather, each by himself with his issue, in the order stated in No. 5.
16. The sisters of the intestate's paternal grandfather equally, —the issue of each deceased sister succeeding as stated in No. 4.
17. The brothers consanguinean of the intestate's paternal grandfather, each by himself with his issue, in the order stated in No. 5.
18. The sisters consanguinean of the intestate's paternal grandfather equally,—the issue of each deceased sister succeeding as stated in No. 4.
19. The intestate's paternal great-grandfather; and then his collaterals as above; and so on as far as propinquity can be traced; and failing of any proofs of propinquity, the Crown succeeds as *ultimus hæres.*(*p*)

(*p*) Bell's Prin. § 1669 ; Ersk. 3, 8, 9.

260. Table of Succession.—A still more concentrated view of the operation of the above rules is exhibited in the following table. Descent is traced from A, and the relatives succeed in the order of the numbers placed under their names, each as he succeeds transmitting to his issue male and female in the order above stated. The numbers within parentheses denote the order of succession in conquest as distinguished from the order in heritage :—


The Collaterals of A's Paternal Great-grandfather succeed as below :—
A's Grandfather's Eldest Sister. 28
A's Grandfather's Eldest Brother. 27
A's Grandfather's next Elder Sister. 28
A's Grandfather's next Elder Brother. 26
A's Paternal Grandfather. 24
A's Grandfather's Youngest Sister. 28
A's Grandfather's Youngest Brother. 25
A's Grandfather's Half-Brothers consanguinean. 29
A's Grandfather's Half-Sisters consanguinean. 30
A's Father's Eldest Sister. 21 (21)
A's Father's Eldest Brother. 20 (19)
A's Father's next Elder Sister. 21 (21)
A's Father's next Elder Brother. 19 (18)
A's Father. 17 (17)
A's Father's Youngest Sister. 21 (21)
A's Father's Youngest Brother. 18 (20)
A's Father's Half-Brothers consanguinean. 22 (22)
A's Father's Half-Sisters consanguinean. 23 (23)
A's Eldest Sister. 14 (14)
A's Eldest Brother. 13 (12)
A's next Elder Sister. 14 (14)
A's next Elder Brother. 12 (11)
A
A's Youngest Sister. 14 (14)
A's Youngest Brother. 11 (13)
A's Half-Brothers consanguinean. 15 (15)
A's Half-Sisters consanguinean. 16 (16)
Person last seized.
A's Eldest Daughter. 8
A's Eldest Son. 1
A's Second Son. 4
A's Second Daughter. 8
A's Youngest Son. 5
A's Youngest Daughter. 8
A's Elder Grandson by Eldest Daughter. 9
A's Younger Grandson by Eldest Daughter. 10
A's Grandson by Eldest Son. 2
A's Grand-daughter by Eldest Son. 3
A's Granddaughter by Youngest Son. 7
A's Grandson by Youngest Son. 6
A's Elder Grand-daughter by Youngest Daughter. 9
A's Younger Grand-daughter by Youngest Daughter. 9

Legal Burdens affecting the Right of the Heir.

261. Terce.—Terce is a liferent given by law to a widow who has not accepted of a conventional provision in lieu of it of one-third of the heritable property in which her husband died infeft in fee, whether such property was acquired before or during the marriage.(*a*)

If the property be already charged with terce to the widow of a former proprietor, the second terce is one-third of the two-thirds remaining unaffected by the first terce; but on the death of the first widow, the terce of the second widow becomes enlarged, as if the first had never existed.(*b*)

The right to terce obtained by our most ancient customs,(*c*) but its origin is a matter of controversy.(*d*) According to one Institutional writer,(*e*) "terce is given to the wife to the effect that, if it happen her husband to decease before her, she may the more easily be married with another man." Another (*f*) assigns the custom "to the natural right a wife has to a reasonable settlement out of the husband's estate in case of her survivorship, as she ought not to be left destitute, though the husband neglect to provide for her;" while another says,(*g*) "the custom arose from an obligation upon the husband to provide for his wife. . . . The terce keepeth always proportionable, and maketh the wife sharer of the industry and fortune of the man, and therefore more careful over it."

Whatever the origin of the right, however, it is certain that it obtained in our law from early times. It vests by survivance, and cannot be defeated by any act of the husband to which the wife has not assented.(*h*)

The right is excluded (*i*)—

1. By the wife's acceptance of a special provision in lieu of it.
2. By all *bona fide* transferences and real burdens feudally completed before the husband's death.
3. By a clause of exclusion in an entail.(*j*)

(*a*) Bell's Lect. p. 795; Bell's Com. 2, 56; Ersk. 2, 9, 45; Stair, 16, 12.
(*b*) Ersk. 2, 9, 47.
(*c*) Reg. Mag. 2, 16.
(*d*) Fraser, 1, 603.
(*e*) Balfour's Prac. p. 105.
(*f*) Ersk. 2, 9, 44.
(*g*) Stair, 16, 12.
(*h*) Act.
(*i*) Ersk. 2, 9, 51.
(*j*) *Noble*, 1758, M. 15,606; *Hay Newton*, 18th July, 1867, 5 Macph. 1066.

4. Where the marriage is dissolved on the ground of the wife's adultery; but not where dissolved for the husband's adultery.(*k*)
5. Where the marriage is dissolved within year and day without a living child being born of it, unless the contrary be provided in a marriage contract.(*l*)

Doubts have been expressed by some writers as to whether the terce is not now due, although the marriage had not subsisted for a year and day, in respect of the provisions of the Intestacy Act of 1855. That Act provides that "where a marriage shall be dissolved before the lapse of a year and day from its date by the death of one of the spouses, the whole rights of the survivor, and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid."(*m*) But it will be observed that the express object of that Act is "to alter the law of intestate *moveable* succession," and the language of it is not strictly applicable to heritable rights. The above quoted provision respecting the "whole rights of the survivor," on the "death of *one* of the spouses" might be construed as applicable to the right of terce; but it cannot be construed to apply to the right of courtesy, as courtesy arises by the mere fact of a viable child and heir being born of the marriage, and it does not appear to be essential that the child and heir be born during the marriage, if it be legitimated *per subsequens matrimonium*.(*n*) If therefore the Act cannot be interpreted to apply to the right of courtesy, it was plainly not intended that it should apply to the right of terce.

262. From what Subjects Terce due.—Terce is in general due from all heritable subjects and rights in which the husband died infeft,(*o*) irrespective of tenure.(*p*) The husband's infeftment is both the measure and the security of the right, and so every right which excludes the husband's sasine is preferable to it.(*q*) Debts made real on the estate exclude it, and so will the exercise of a power to burden, if infeftment has followed; whatever burdens affect the husband's sasine, affect also the terce, and

(*k*) M'Laren, § 158.

(*l*) Ersk. 2, 9, 51; Stair, 2, 6, 17.

(*m*) 18 Vict. c. 23, § 7; M'Laren, § 157; Bell's Lect. p. 795; Bell's Com. 2, 56.

(*n*) *Crawford's Trs.* v. *Hart*, 1802, M. 12,698; Fraser, 1, 638.

(*o*) Ersk. 2, 9, 45; Stair, 2, 6, 16.

(*p*) 24 & 25 Vict. c. 86, § 12.

(*q*) Bell's Prin. § 1598; Bell's Lect. p. 798.

no debt which does not constitute a real burden on the terce lands affects it.(*r*)

Conquest heritage was subject to terce.(*s*) The right also extends to heritable securities, excluding executors, if the husband was infeft(*t*); servitudes attaching to the estate(*u*); estates vested in trustees, and infeft for behoof of the husband, whether under a deed of trust, or an *ex facie* absolute disposition, qualified by an unrecorded back letter(*v*); estates vested in the husband in liferent, and his children in fee; also property settled *intuitu mortis*, under reservation of a power to alter; but not where the husband is vested by a *mortis causa* deed in a liferent, even though coupled with a general power of disposal, as a right of that nature does not amount to beneficial fee.(*w*) Shootings are subject to terce.(*x*)

Terce is not due from leases or heritable estates possessed in a personal title(*y*); nor from teinds unless feudalised(*z*); nor from the mansion-house, unless it be let, or there be more than one(*a*); nor from superiorities, either in relation to feu-duties or casualities, rights of reversion, patronage, coal, or other minerals.(*b*) But though a widow is not entitled to terce out of minerals, she is entitled to a supply for her own consumption.(*c*)

263. Service of Tercers.—Although terce vests, as already stated, by survivance of the wife, or on the dissolution of the marriage by the divorce of the husband, a service seems necessary to enable her to assign or transmit to her executors the fruits of it.(*d*) Without such service a tercer is entitled to receive the rents or fruits of the subjects, and her discharge to tenants will be valid to the extent of her interest; but she cannot, in that transition state, sue tenants for arrears of rent,(*e*) and her right to unrecovered arrears does not transmit to her representatives.(*f*)

(*r*) Sandford, 2, 109.
(*s*) Ersk. 2, 9, 45.
(*t*) 31 & 32 Vict. c. 101, § 117.
(*u*) Ersk. 2, 9, 48.
(*v*) M'Laren, § 162.
(*w*) *Alves*, 8th March, 1861, 23 D. 712.
(*x*) *Menzies*, 10th July, 1855, 17 D. 1090.
(*y*) M'Laren, § 165.
(*z*) Ersk. 2, 9, 48.
(*a*) *Mead*, 1796, M. 15,873.
(*b*) M'Laren, § 166; Bell's Prin. § 1598.
(*c*) 1 Fraser, 621.
(*d*) Bell's Prin. § 1602; M'Laren, § 211; *Pringle*, 2nd March, 1870, 8 M. 622.
(*e*) M'Laren, § 167.
(*f*) *M'Leish*, 21st Feb. 1826, 4 Sh. 485, N. E., 491; Stair, 26, 15; Ersk. 2, 9, 55.

The procedure in the service of tercers is regulated by the statute 1503, c. 77.(*g*) After service the widow has a *pro indiviso* usufructuary interest, and she may have it divided, if wished, by a process before the Sheriff, called "Kenning to the terce." Substantially, however, the widow's right is as real before as after division.(*h*)

264. Courtesy.—This is a liferent given by law to the surviving husband of the heritable property in which the wife died infeft. It is given in respect of the husband being the father of the wife's heir.(*i*)

Like the correlative right of terce, the right of courtesy has come down to us from early times.(*j*)

Craig says of it that it was introduced "to prevent the husband falling into poverty or contempt on his wife's death;"(*k*) but Erskine thinks "this reason inadequate, as the right reaches to the wife's whole heritage, and so exceeds the measure of an alimentary provision.(*l*)

The conditions of the right are:—

1. That a viable child shall have been born of the marriage.(*m*)
2. That no heir of the wife by a former marriage exists.(*n*)
3. That the wife shall have succeeded to the property as heir-of-line, tailzie, or provision(*o*); and,
4. That the wife shall have died infeft of fee.(*p*)

265. From what Subject Courtesy due.—From the whole heritable estate inherited by the wife as heir-of-line, or provision, or acquired by her from her ancestor in his lifetime *perceptione hæreditatis*, and in which she died infeft in fee, including burgage subjects and feu-duties(*q*); but not conquest heritage or estate which she acquired by singular title, unless she was *alioquin successura*.(*r*) The right attaches to entailed property, if not debarred by the entail.(*rr*) It is liable to be diminished by the

(*g*) See Stair, 4, 3, 11; Her. Styles 4th Ed. p. 325; 1 & 2 Geo. IV. c. 38, § 11.

(*h*) See M'Laren, §§ 211, 218.

(*i*) Bell's Lect. p. 794; Stair, 16, 19; Ersk. 2, 9, 52.

(*j*) Reg. Mag. 2, 5, 8; Leg. Burg. c. 44.

(*k*) 2, 22, 40.

(*l*) 2, 9, 52.

(*m*) Ersk. 2, 9, 53; *Robertson*, 22nd Jan. 1883, 11 Sh. 297.

(*n*) 1 Fraser, 638.

(*o*) Bell's Prin. § 1606.

(*p*) Ersk. 2, 9, 52.

(*q*) M'Laren, § 173, 174.

(*r*) Stair, 2, 6, 19; Ersk. 2. 9, 54.

(*rr*) *Clinton*, 18th Dec. 1869, 8 M. 370

interest on heritable debts, and also by the interest (not the principal) of personal debt to the same extent to which the estate would be liable if it were in his possession as absolute proprietor.(*s*)

266. Vesting of Courtesy.—The right vests by survivance ; but unlike the correlative right of terce, the surviving husband requires no title to enable him to continue his possession after the wife's death, or to assign or transmit to his executors the rents accruing during his lifetime.(*t*) He enjoys the usual rights and privileges of a liferenter.(*u*) He can be made to find caution where there is reasonable apprehension of injury to the estate by waste or dilapidation actually commenced.(*v*)

Legal Rights of Heir before completing Title.

267. Right of Apparency.—Formerly, where a person possessed of heritage died intestate, the estate lay in abeyance, as it were, or in legal phraseology, *in hæreditate jacenti* of the ancestor, until the apparent heir made up a title for transmitting the estate from the ancestor to himself, or, as it was called, vesting the succession.(*a*)

The heir was entitled to continue his ancestor's possession, and to pursue for, receive, and discharge the rents due from the estate before completing a title ; and generally, he had all the active rights necessary to enable him to maintain possession, except that he could not remove tenants holding leases from the ancestor.(*b*) He might challenge and reduce all deeds executed on deathbed alienating or affecting the estate to his prejudice ;(*c*) and he might also pursue a judicial ranking and sale of the estate, whether it were bankrupt or not.(*d*) With the exception of the subjects after mentioned,(*e*) possession without a title did not vest any estate in the heir, and if he died, the estate passed to the ancestor's next heir.(*f*)

But, under an Act passed in 1874,(*g*) a personal right to land now vests in the apparent heir without service.

(*s*) Ersk. 2, 9, 54 ; Bell's Prin. § 1607.
(*t*) Stair, 2, 6, 19 ; M'Laren, § 175.
(*u*) Ersk. 2, 9, 54.
(*v*) Ersk. 2, 9, 59 ; *Ralston* v. *Leitch*, 1803 ; Hume, 293.
(*a*) Ersk. 3, 8, 54 ; M'Laren's, § 177.
(*b*) M'Laren, § 189.
(*c*) *Graham*, 1799, M. 3186.
(*d*) 1695, cap. 24.
(*e*) See § 275.
(*f*) M'Laren, § 184.
(*g*) 37 & 38 Vict. c. 94, § 9.

268. Right of Deliberation.—Formerly the heir was allowed by statute(*h*) six months, computed from the ancestor's death, or from his own birth if posthumous, to ascertain the extent of his ancestor's debts, and to consider whether it would be for his interest to take up or renounce the succession.(*i*) With this view, he was entitled (and he might do so at any time before service(*j*) to bring an action to compel persons who were in possession of his ancestor's title-deeds, securities, books, &c., to produce them for his inspection and information;(*k*) and during that period no action could be brought into Court against him,(*l*) except in relation to the widow's jointure.(*m*) But this privilege was terminated not only by the lapse of the six months, but by the heir making up a title;(*n*) or by taking possession and uplifting the rents; or by certain other acts of intromission to be noticed in the following section, in which case he incurred the responsibility appropriate to his title of possession.(*o*)

But by a recent Act the law has been altered as from 1st October, 1874. That Act declares that—

An heir shall not be liable for the debts of his ancestors beyond the value of the estate of such ancestor to which he succeeds; and if an heir shall renounce the succession, the creditors of the ancestor shall have the same rights against the estate as upon a renunciation according to the law before the commencement of this Act. When an heir has, before renunciation, intromitted with the ancestor's estate, he shall be liable for the ancestor's debts to the extent of such intromissions, but no further.(*p*)

Legal Responsibilities attaching to Possession without a Title.

269. Where Responsibility incurred.—Formerly, where an apparent heir intromitted with his ancestor's heritage without entering by special service, or otherwise taking means to limit his liability, he was said to have incurred a passive title, by which he

(*h*) 31 & 32 Vict. c. 101, § 61.
(*i*) Ersk. 3, 8, 54.
(*j*) *M'Farlane*, 1799, M. 3991.
(*k*) *Adair*, 1787, M. 3992.
(*l*) *Mackintosh*, 9th July, 1829, 7 Sh. 882.
(*m*) *Pitcairn*, 1702, M. 6876.
(*n*) *Campbell*, 1708, M. 6877.
(*o*) M'Laren, § 187.
(*p*) 37 & 38 Vict. c. 94, § 12.

subjected himself to universal liability for his ancestor's debts and obligations. The liability was incurred to creditors of the ancestor, but not to persons interested only in the succession.(*q*) It was incurred where the heir, by himself or others on his behalf, drew the rents without completing a title(*r*); where he conveyed or concurred in a conveyance of any part of the heritage(*s*); where he uplifted or discharged debts due to the deceased(*t*); where he bought the heritage to which he was heir otherwise than at a public sale, or intromitted with papers in a charter-chest(*u*); or where he possessed any part of the heritage on a title derived from a relation to whom he was heir.(*v*) But, as stated in the preceding section, the law has now been altered as regards all successions opening after 1st October, 1874. An heir is not now liable for the debts of his ancestor beyond the value of such ancestor's estate to which he succeeds.

270. Where Responsibility not incurred.—Under the law applicable to successions opening previous to 1st October, 1874, it was held that no responsibility for the ancestor's debts attached where the intromitter was not apparent heir(*w*); where the apparent heir did any ineffectual act, although in the character of apparent heir(*x*); where the property did not truly belong to the predecessor(*y*); where the intromission might fairly be ascribed to another title than the assumption of the succession(*z*); where the intromission was inconsiderable, and without suspicion of fraud(*a*), such as by assumption of a title of honour or a hereditary office(*b*); by making up a title for the mere purpose of implementing the ancestor's feudal conveyance(*c*); by mere service without taking benefit by it(*d*); by taking possession of the titles for examination only(*e*); by conveying the heritage to the ancestor's creditors, to enable them to complete a title for their own benefit(*f*); or by service on a limited title.(*g*) The responsibility is now limited as stated in the preceding section.

(*q*) Bell's Prin. § 1919; M'Laren, § 2267; Ersk. 3, 8, 50.
(*r*) Ersk. 3, 8, 83.
(*s*) *Ibid.* 3, 8, 84.
(*t*) *Ibid.* 3, 8, 84.
(*u*) *Ibid.* 3, 8, 92.
(*v*) *Ibid.* 3, 8, 94.
(*w*) *Irvine*, 1626, M. 9649.
(*x*) *Middleton*, 1682, M. 9651.
(*y*) *Gordon*, 1663, M. 9667.
(*z*) *Webster*, 1802, Hume, 436.
(*a*) Ersk. 3, 8, 86.
(*b*) *Bower*, 1682, Br. Sup. 18.
(*c*) *Middleton*, 1682, M. 9651.
(*d*) *Fife*, 1828, 6 Sh. 698.
(*e*) *Ferguson* v. *M'Gachen*, 1829.
(*f*) *Blount*, 1783, M. 9371.
(*g*) Bell's Prin. § 1992.

Feudal Investment of Heirs.

271. Service of an Heir.—Previous to the passing of the Conveyancing Act, 1874(*h*), it was necessary in order to obtain a vested and transmissible interest in heritable subjects, that the heir made up a title by service or writ of *clare constat.* A service is a proceeding before a Sheriff for ascertaining the heir of a person deceased(*i*); it is either general or special—general where the heir wishes to establish right to such heritable subjects belonging to the ancestor as do not require infeftment, or to which the deceased has merely personal rights, without reference to any particular subject; and special where he wishes to establish right to particular lands in which the ancestor died infeft.(*j*)

But by the said Act of 1874(*k*), the heir is now put, immediately on the succession opening to him, in the same position as if he had held a disposition of the lands from his ancestor infeft therein, and consequently he is enabled at once to deal with the estate, either onerously or gratuitously, and it can be attached for his debts, excepting that the ancestor's creditors have a preference under the Act 1661 c. 24.

The words of the Act are:—

A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest, or be held to have vested, in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act, provided the heir shall be alive at the date of the commencement of this Act, if such person shall have died before that date, and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequences, and be transmissible in the same manner as a personal right to land under an unfeudalised conveyance, according to the existing law and practice.

To prevent injury to other parties from this new mode of vesting a personal right to an estate in an heir-apparent, the said Act of 1874 assimilates the right so acquired by an apparent heir to the right acquired by service under the former law, with respect to the power to challenge the title within twenty years, and it also provides remedies for preserving the rights of such other parties.

(*h*) 37 & 38 Vict. c. 94.

(*i*) Stair, 3, 5, 25; Bell's Prin. § 1824.

(*j*) Bell's Prin. § 1826; Ersk. 3, 8, 63.

(*k*) § 9.

The words of the Act in this respect are :—(*l*)

The right of any person to an estate in land by succession as heir acquired after the commencement of this Act may, at any time within twenty years of his infeftment as heir and his entering into possession of such estate, but not thereafter, be challenged by any one who would have been entitled to challenge the decree of service of such person had he expede a service according to the practice existing prior to this Act; and, in the absence of evidence to the contrary, the date of his infeftment shall, for the purpose of this limitation, be assumed to be the date of entering into possession; and such challenge may be made by an action to negative or set aside the alleged right of succession, or to reduce any title expede in virtue of such alleged right.

Nothing herein contained shall prejudice or affect the legal remedies of any person having lawful title and interest to prevent any other person from entering into possession of an estate in land as heir, or to remove him from possession, or to obtain sequestration of such estate, or the appointment of a judicial factor pending the trial of any question regarding the right of succession; and it shall be lawful for a court of competent jurisdiction to regulate possession pending such trial, as the court shall see just, notwithstanding the completion, under this Act, of the title of any person as heir.

Where an apparent heir dies, having only the constructive personal right to lands given by this last-mentioned Act, his heir or disponee may make up a title according to a new mode provided by the Act; or he may make up a title by service to the proprietor last infeft according to the former practice. The new mode of making up a title is described in the Act as follows :—(*m*)

A title of an heir to, or disponee of, a proprietor of any lands who was neither infeft nor served, but vested only with a personal right to such lands, by virtue of this Act, or of any person acquiring right from such heir or disponee, may be made up in like manner as if the person making up a title had held a disposition from the proprietor last infeft in the lands in favour of his immediate successor therein, and a disposition and assignation from each heir or disponee, if any, intervening between such immediate successor and the person so making up a title in favour of his immediate successor therein; and such title may be made up in manner following—viz.: The heir or disponee or other successor making up such title shall present to the Sheriff of Chancery, or to the Sheriff of the county where the lands are situated, a petition which may embrace several separate

(*l*) §§ 13, 14. | (*m*) § 10.

lands or estates, and may be in the form of schedule E hereto annexed, or as nearly in that form as the circumstances in each particular case will permit, setting forth the name of the proprietor last infeft, a description of the lands, or a valid reference thereto, and the names and, so far as known, the designations of every proprietor having only a personal right therein, whether by succession, bequest, gift, or conveyance, who has intervened between the proprietor last infeft and the petitioner, and also setting forth the petitioner's own right to the said lands; and on the decree pronounced on said petition finding the facts therein set forth proved, and that the petitioner is entitled to be infeft in the said lands, being extracted in one or several extracts, and on such extract decree or decrees, as the case may be, being recorded in the appropriate register of sasines, the petitioner shall be held to be duly infeft in the said lands contained in the extract or extracts so recorded. Such petition shall be presented, published, and carried through in all respects as if the same were a petition for special service under the now existing law; and the extract decree or decrees on such petition, as the case may be, shall be equivalent to a decree of special service, and when duly recorded as aforesaid in the appropriate register of sasines, shall have the same effect as regards the lands therein contained as an extract decree of special service duly recorded under the now existing law.

The form of petition here referred to is as follows:—

Unto The Honourable the Sheriff of [*specify the county, or say* "of Chancery,"] the petition of A. B. of G.

Humbly sheweth,

That the late C. D. of G. died last vest and seised in all and whole [*describe or refer to the lands as the same are described or referred to in the recorded deed or instrument in favour of the person who was last vest and seised in the lands, or refer to them as described in some other recorded deed or instrument*] conform to instrument of sasine [*or other recorded deed or instrument, as the case may be*], recorded in the [*specify the register of sasines and date of recording, and where there are any real burdens, conditions, or qualifications, here specify or refer to them, or where the lands are held under entail, here specify the conditions of the entail, or refer to them as contained in the entail, as recorded in the register of tailzies, or if it is not so recorded, in the entail or other deed or instrument recorded in the register of sasines*].

Or, that M. N. of Y. was last vest and seised in all and whole [*describe or refer and specify title and date of recording, &c., as above*]. That the said M. N. by disposition dated [*specify date*] conveyed the

said lands to C. D. of G. That the said C. D. died, never having been infeft in the said lands.

That E. F., eldest son of the said C. D.(*n*) [*or otherwise, as the case may be*], is his heir in the said lands, but has only a personal right thereto.

That the said E. F., by disposition dated [*specify date*], conveyed the said lands to the petitioner.

Or, that upon the death of the said C. D., he was succeeded by E. F., his eldest son [*or otherwise, as the case may be*], as his heir in the said lands. That the said E. F. died unserved and uninfeft, [*or* that the said E. F. expede a special service as heir of the said C. D., conform to decree of the Sheriff of Chancery [*or as the case may be*], in his favour as heir foresaid, dated [*insert date*], but died without being infeft thereon], *or* that the said E. F. expede a general service as heir of the said C. D., conform to decree [*specify the decree*], but made up no further title.

Or otherwise specify the nature of the right in the person of E. F.

That the said E. F. disponed the said lands *or* conveyed his whole estate, heritable and moveable, to G. H., conform to [*describe title by name and date, and where there are any real burdens, conditions, or qualifications, specify or refer to them*].

That the said G. H. also died, having only a personal right to the said lands, and was succeeded by his eldest son, K. L., his nearest and lawful heir in the said lands [*or otherwise, as the case may be*].

That the said K. L. died unserved, and having only a personal right to the said lands, [*if the petitioner is his heir, say*] and was succeeded by the petitioner, the said A. B., his eldest son [*or otherwise, as the case may be*] and nearest and lawful heir in the said lands [*or when the petitioner is a disponee, or has otherwise acquired right from* K. L., *say.*] That the said K. L. disponed the said lands [*or* conveyed his whole estate, heritable and moveable, *or otherwise, as the case may be*] to the petitioner, the said A. B., conform to disposition *or* general disposition [*or otherwise, as the case may be*] dated [*specify date*], granted in his favour by the said K. L., who died unserved and having only a personal right to the said lands; [*and if the deed be granted under any real burden, or condition, or qualification, add*] but always under the real burden, &c.; [*and if the deed be granted in trust or for specific purposes, add*] but always in trust *or* for the uses, ends, and purposes mentioned in the said general disposition [*or otherwise, as the case may be*].

(*n*) An error as to the character of the heir will not invalidate petition, if the petitioner is in truth the heir (37 & 38 Vict. c. 94, § 11).

May it therefore please your Lordship to find the facts above set forth proved, and that the petitioner is entitled to procure himself infeft in the foresaid lands, in terms of "The Conveyancing (Scotland) Act, 1874," and to decern.

According to justice, &c.

[*Signed by the petitioner or his mandatory.*]

NOTE.—If any of the transmissions have been judicial, as by adjudication, act and warrant of court, or otherwise, or if by any of the transmissions a part or parts only of the lands are transferred, the necessary alterations may be made on the form of the petition.

272. Procedure in expeding a General Service.—The claimant presents a petition to the Sheriff of the county within which the deceased had at the time of his death his ordinary or principal domicile, or, in the option of the claimant, to the Sheriff of Chancery; and if the deceased had at the time of his death no domicile within Scotland, then, in every such case, to the Sheriff of Chancery, setting forth the particulars embodied in the form given in Schedule P. in the Appendix to the Lands Consolidation Act, 1868(*o*), which form is in the following terms:—

Unto The Honourable the Sheriff of [*specify the county, or say* "of Chancery,"] the petition of A. B. [*here name and design the petitioner*].

Humbly sheweth,

That the late C. D. [*here name and design the ancestor to whom service is sought*] died on or about the day of , and had at the time of his death his ordinary or principal domicile in the county of [*or* furth of Scotland, *as the case may be*]. [*In cases where the deceased died upwards of ten years before the date of the petition, and the petitioner cannot ascertain the place of the domicile, say* that the late C. D. [*here name and design the ancestor to whom service is sought*] died on or about the day of , but the petitioner is unable to prove at what place the deceased had his ordinary or principal domicile at the time of his death.]

That the petitioner is the eldest son(*p*) [*or state what other relationship or character of heir the petitioner bears*] and nearest lawful heir in general of the said C. D. *If the service is as heir of provision, say*

(*o*) 31 & 32 Vict. c. 101, § 28. | (*p*) See note (*n*) as to character of heir.

that the petitioner is the eldest son [*or state what other relationship or character of heir the petitioner bears*] and nearest lawful heir of provision in general of the said C. D., under and by virtue of a deed [*specify the deed of provision*] executed by E. F., dated the day of , *or otherwise describe the deed so as to clearly identify it, or, if the service is as heir of tailzie, say* that the petitioner is the eldest son [*or state what other relationship, &c., the petitioner bears*], and nearest and lawful heir of tailzie and provision in general of the said C. D., under and by virtue of a disposition and deed of entail granted by E. F., dated the day of , and recorded in the register of tailzies the day of , whereby the said E. F. conveyed the lands of M. to and in favour of J. K. [*here set forth the destination or such part thereof as may be deemed necessary, or say*, and the other heirs therein mentioned]; but always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses, [*or* clause authorising registration in the register of tailzies, *as the case may be*], contained in the said recorded deed of entail, and here referred to as at length set forth therein.

May it therefore please your Lordship to serve the petitioner nearest and lawful heir in general to the said C. D. [*or whatever other character of heir is sought to be established here set it forth.*]

According to justice, &c.

[*Signed by the petitioner or his mandatory.*]

If the deceased died upwards of ten years prior to the date of presenting a petition for general service, it is not necessary to state or prove the county within which the deceased had his ordinary or principal domicile at the time of his death, or that such domicile was furth of Scotland. In such cases it is sufficient (so far as regards the domicile of the deceased) for the claimant to state in the petition, and if required in the court of service to make oath that he is unable to prove the deceased's domicile at the time of death.(*q*)

The petition of service, if presented to the Sheriff of any county, must be published in such county by affixing on the doors of the court-house, or in some conspicuous place of the court or of the office of the Sheriff-clerk of the county, as the Sheriff may direct, a short abstract thereof, as well as edictally in Edinburgh; and if the petition be presented to the Sheriff of Chancery, it must be published edictally in Edinburgh as well as in the county of the

(*q*) 31 & 32 Vict. c. 101, § 34.

domicile of the party deceased, in manner before stated, where such domicile was within Scotland, or in the county or counties in which the lands are situated, as the case may be (*r*); and after the lapse of fifteen days (twenty days if the deceased died in Orkney or Shetland, and thirty days if he died abroad)(*s*) from the date of the latest publication, evidence of the particulars in the petition may be laid before the Sheriff to whom the petition was presented, which evidence may be taken by the Sheriff himself, or by a magistrate of any city or burgh, or by any justice of peace or notary-public, and thereupon the Sheriff will pronounce, or refuse, decree of service.(*t*) If decree be pronounced, the Sheriff-clerk transmits to the office of the Director of Chancery the whole proceedings, and on such decree being recorded by the latter, he issues an extract thereof, which is the legal evidence of the service.(*u*)

A general service is liable to be reduced at any time within twenty years at the instance of any person claiming the character of nearest heir in general.(*v*)

A general service may be obtained to a limited effect by annexing a specification which infers a limited passive representation(*w*), but this form of service is now superseded by the provision in the Conveyancing Act, 1874(*x*), which limits the liability of heirs in every case to the value of the estate to which they succeed.

Until the passing of the Act last referred to, a general service conferred on the heir no right to the lands of his ancestors; and if he died uninfeft, his heir in making up a title was obliged to pass him over and serve as heir in special to the person last infeft. This has now been altered by the said Act, which provides(*y*)—

> When a proprietor has died or shall have died infeft in lands, and the heir of the investiture has expede, or shall have expede, a general service as heir of such proprietor, the decree of general service in favour of such heir shall be equivalent to a *mortis causa* general disposition of the lands by such proprietor in favour of such heir, to the effect of enabling such heir, or those deriving right from or by succession to him, to expede and record in the appropriate register of sasines all notarial instruments applicable to such lands which a

(*r*) 31 & 32 Vict. c. 101, § 30.
(*s*) *Ibid.* § 33.
(*t*) *Ibid.* § 35.
(*u*) *Ibid.* §§ 37, 46.
(*v*) *Ibid.* § 43; Act 1617, c. 13; *M'Lean*, 28th Feb. 1849, 11 D. 880.
(*w*) 31 & 32 Vict. c. 101, § 49.
(*x*) § 12.
(*y*) § 31.

general disponee or those deriving right from him may expede and record under or in terms of "The Titles to Land Consolidation (Scotland) Act, 1868," or of this Act, and that notwithstanding that such proprietor may have died in nonage, or been of insane mind, or laboured under any other disability whatever; provided always, that no general service shall have such effect in any case where the heir so served shall have died before the commencement of this Act; and a general service expede by the heir of any person so served, and dying after the commencement of this Act, or by any of the successive heirs of the investiture, or by the heir of any general disponee, shall have the like effect as a transmission of the right to the lands; and any such services shall be sufficient links in the series of titles for the connection of the person expeding such instrument with the person last infeft, in the same manner as is herein-before provided with reference to two or more general dispositions forming links in such series.

273. Procedure in expeding a Special Service.—The claimant presents a petition to the Sheriff within whose jurisdiction the lands, or the burgh containing the lands, in which the deceased died last vest and seised are situated, or in the option of the petitioner, to the Sheriff of Chancery; and should the lands be situated in more counties than one, or in more burghs than one, if such burghs are in different counties, then in every such case to the Sheriff of Chancery(*z*), setting forth the particulars embodied in Schedule O in the Appendix to the Lands Consolidation Act, 1868, which schedule is in the following form:—

> Unto the Honourable the Sheriff of [*specify the county, or say* "of Chancery,"] the petition of A. B. [*here name and design the petitioner*].
>
> Humbly sheweth,
>
> That the late C. D. [*here name and design the ancestor*] died on or about the day of [*state the month and the year at full length*], last vest and seised in [*here describe or refer as in schedule* (*E*) *or schedule* (*G*) *to the lands with reference to which the service is sought*] conform to disposition [*or other deed or conveyance*] dated the day of and along with warrant of registration thereon, on behalf of the said C. D., recorded in the register of sasines [*specify register*] on the day of [*or* conform to disposition, *or whatever*

(*z*) 31 & 32 Vict. c. 101, § 28.

else was the deed or conveyance on which the ancestor's infeftment proceeded, here specify it], dated the day of , and to instrument of sasine following thereon, recorded in the register of sasines [*specify register*] on the day of *or otherwise specify the title of deceased as recorded in the register of sasines; and when the lands are held under a deed of entail, here insert the conditions, &c., at full length, or refer to them in or as nearly as may be in the form of schedule* (*C*), *or, if desired, refer to them as follows*, but always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses [*or* clause authorising registration in the register of tailzies, *as the case may be*], contained in a deed of entail granted by G. H. [*here name and design the grantor*] dated the day of , in favour of I. K. [*here set forth the destination, or such part thereof as may be deemed necessary, or say*, and the heirs therein specified], and which conditions, provisions, and prohibitory, irritant, and resolutive clauses [*or* clause authorising registration in the register of tailzies, *as the case may be*], are herein referred to, as at length set forth in the said deed of entail, which is recorded in the register of tailzies on the day of [*or* as at length set forth in the above-mentioned recorded disposition, *or other deed or conveyance in favour of the deceased, or as at length set forth in any other recorded deed or conveyance. And in every case where there are any real burdens, conditions, provisions, or limitations, proper to be inserted or referred to, insert them here, or refer to them in or as nearly as may be in the form of schedule* (*D*).

That the petitioner is the eldest son [*or state*(*a*) *what other relationship or character the petitioner bears*], and nearest lawful heir in special of the said C. D. in the lands and others foresaid. [*If the service is as heir of provision, say*, that the petitioner is the eldest son [*or state what other relationship or character the petitioner bears*] and nearest lawful heir of provision in special of the said C. D. in the lands and others foresaid, under and by virtue of a deed [*or other conveyance*] executed by E. F., dated [*here describe the deed or conveyance by date, or otherwise describe it so as clearly to identify it*]. *And if the service is as heir of entail, say*, that the petitioner is the eldest son (*or state what other relationship or character the petitioner bears*), and nearest and lawful heir of tailzie and provision in special of the said C. D. in the lands and others foresaid, under and by virtue of the said deed of entail.

[*If it is wished to embrace a service in general in the same character as that in which special service is sought, say*, That the petitioner is likewise heir in general, *or* of provision in general, *or* of tailzie and

(*a*) See note (*n*), p. 261 as to character of heir.

provision in general, *or otherwise, as the case may be*, of the said C. D.]

May it therefore please your Lordship to serve the petitioner nearest and lawful heir [*or* heir of provision, *or* heir of tailzie and provision, *or otherwise as the case may be*) in special of the said deceased C. D. in the lands and others above described [*and where a general service is wished, add*, and likewise nearest and lawful heir (*or* heir of provision, *or* heir of tailzie and provision) in general of the said C. D., *or whatever else is the character of heir sought to be established, here set it forth as above*]. *And where the service is as heir of tailzie and provision, say here*, but always with and under the conditions, provisions, prohibitory, irritant, and resolutive clauses [*or* clause authorising registration in the register of tailzies] above referred to [*or* above written]; *and where there are real burdens, &c., say*, but always with and under the real burdens, &c., above referred to [*or* above written]. *And where there are several parcels of land or separate estates, here add, if desired*, and to grant warrant to the Director of Chancery to issue separate extract decrees applicable to one or more of such parcels of land or separate estates.

According to justice, &c.

[*Signed by the petitioner or his mandatory.*]

The rest of the procedure in this case is the same as in the case of a general service, excepting that the evidence to be submitted to the Sheriff regards only the ancestor's death and infeftment, and the claimant's own propinquity.

The extract decree of service operates as a retour, and has also the same operation and effect as a disposition from the ancestor to the heir and his assignees.(*b*)

A special service does not infer a general representation, either active or passive of the deceased, but only a representation to the extent or value of the lands embraced in it.(*c*)

274. Investment by Clare Constat.—Precepts or writs from chancery, or of *clare constat*, and writs of acknowledgment are excepted from the general abolition of charters and writs by progress, contained in the Conveyancing Act, 1874.(*d*) A precept of

(*b*) 31 & 32 Vict. c. 101, §§ 37, 46.
(*c*) *Ibid.* § 47.
(*d*) 37 & 38 Vict. c. 94, § 4 (1).

clare constat is a writ granted by a subject superior to the heir of the last-entered proprietor, under which, when registered in the appropriate register of sasines, the heir obtains a feudal investiture, without either a general or special service. The deed proceeds on the narrative of the death of the proprietor, and of the superior's belief that the person in whose favour it is granted is the lawful heir to the property. To make the deed effectual, the superior granting it must be infeft in his superiority.

A precept from chancery is a writ granted by the Crown to the heir of the last-entered vassal in Crown holdings, and is similar in its nature to a precept of *clare constat.*

In all cases where precepts of *clare constat* were according to the former law and practice competent, writs of *clare constat* may now be granted.(*e*)

An heir in burgage subjects may now make up a title by writ of *clare constat.*(*f*)

The following are the forms of such precepts and writs as given in the Appendix to the said Conveyancing Act, 1868 :—

1. *Crown Writ of* Clare Constat.

Victoria, &c. Whereas by decree of general service [*or* of special service, *as the case may be*] of A. B. [*here insert the name and designation of the heir*], dated [*here insert the date of the decree*], and recorded in chancery [*here insert the date of registration*], and other authentic instruments and documents, it clearly appears that C. D. [*here insert the name and designation of the ancestor*] died last vest and seised as of fee in [*here describe the lands, or refer to them as in schedule* (*E*) *or schedule* (*G*), *as the case may be*]; and that in virtue of [*here describe the Crown charter or Crown precept and sasine, or recorded Crown charter or Crown precept, or other Crown writ or writs forming the last investiture, by dates, and dates of registration in the register of sasines and register of Crown writs, and when the lands are held under a deed of entail, here insert the destination, conditions, &c., at full length, or refer to them in, or as nearly as may be in, the form of schedule* (*C*), *or if desired, refer to them as follows,* but always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses (*or* clause authorising registration in the register of tailzies, *as the case may be*) contained in a deed of entail granted by G. H. (*here name and design the grantor*) dated the day of in favour of I. K. (*here set forth the desti-*

(*e*) 31 & 32 Vict. c. 101, § 101. | (*f*) *Ibid.* § 102.

nation or such part thereof as may be deemed necessary, or say, and the heirs therein specified], and which conditions, provisions, and prohibitory, irritant, and resolutive clauses [*or* clause authorising registration in the register of tailzies, *as the case may be*], are herein referred to as at length set forth in the said deed of entail which is recorded in the register of tailzies on the day of [*or as at length set forth in the above-mentioned recorded charter, &c., forming the last investiture, or as at length set forth in any other recorded deed or conveyance. And in every case where there are real burdens, conditions, provisions, or limitations proper to be inserted or referred to, insert them here or refer to them in, or as nearly as may be in, the form of schedule (D)*]; and that the said A. B. is eldest son and nearest and lawful heir of the said C. D.(*g*) [*or whatever relationship and character of heir the party holds, here state it*]. Therefore we hereby declare the said A. B. to be the heir entitled to succeed to the said C. D. in the said lands to be holden of us and our royal successors in manner and for payment of the duties specified in the [*here specify, or refer to, if previously specified, a Crown charter or other Crown writ containing the tenendas and reddendo. If the reddendo is different from that in the Crown charter or other Crown writ specified or referred to, or if the vassal should desire, specify the reddendo here*]. Given at Edinburgh, the day of in the year .

[*Signed by the Director of Chancery or his depute or substitute.*]

2. *Precept from Chancery.*

Victoria, &c. Whereas by decree of general service [*or* of special service, *as the case may be*], of A. B. [*here insert the name and designation of the heir*], dated [*here insert the date of the decree*], and recorded in chancery [*here insert the date of registration*], and other authentic instruments and documents, it clearly appears that C. D. [*here insert the name and designation of the ancestor*] died last vest and seised as of fee in, &c. [*as in No* 1 *of this schedule down to and including the statement of the relationship and character of heir which the party holds, then say*], and that the said lands and others are holden of us and our royal successors [*here state the tenure, blench, feu, or other*], for payment [*here state the reddendo from the last charter or other writ, as the case may be*]. Therefore we hereby desire any notary-public to whom these presents may be presented to give to the said A. B. as heir foresaid sasine of the lands and others before described; [*if there are conditions of entail, &c., or real*

(*g*) See note (*n*), p. 261.

burdens, here add] but always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses [*or* clause authorising registration in the register of tailzies, *as the case may be*], [*or* with and under the burdens, conditions, provisions, and limitations, *as the case may be*], above specified *or* referred to, *as the case may be*. Given at Edinburgh, the day of in the year.

[*Signed by the Director of Chancery, or his depute or substitute.*]

NOTE.—When the writ or precept is to be granted by or on behalf of the Prince and Steward of Scotland, they will be in similar form, but will run in name of the Prince and Steward of Scotland, without adding His Highness' other titles; and the lands, instead of being described as holding of Her Majesty and her royal successors, will be described as holding of the Prince and Steward of Scotland.

3. *Writ of* Clare Constat *by a Subject Superior.*

I, A. B. [*insert name and designation of superior*]: Whereas by decree of general service [*or* of special service, *as the case may be*], of C. D. [*here insert the name and designation of the heir*], dated [*here insert the date of the decree*], and recorded in chancery [*here insert the date of registration*], and other authentic instruments and documents [*or* by authentic instruments and documents], it clearly appears that E. F. [*here insert the name and designation of the ancestor*] died last vest and seised as of fee in [*here describe the lands or refer to them as in schedule* (*E*) *or schedule* (*G*), *as the case may be*], and that in virtue of [*here describe the charter or precept and sasine, or recorded charter or precept, or other writ or other deed or conveyance forming the last investiture, by dates, and dates of registration in the register of sasines, and where the lands are held under a deed of entail here insert the destination, conditions, &c., at full length, or refer to them in or as nearly as may be in the form of schedule* (*C*), *or, if desired, refer to them as follows*, but always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses (*or* clause authorising registration in the register of tailzies, *as the case may be*), contained in a deed of entail granted by G. H. (*here name and design the grantor*), dated the day of , in favour of I. K. (*here set forth the destination or such part thereof as may be deemed necessary, or say*, and the heirs therein specified), and which conditions, provisions, and prohibitory, irritant, and resolutive clauses (*or* clause authorising registration in the register of tailzies, *as the case may be*) are herein referred to as at length set forth in the said deed of entail,

which is recorded in the register of tailzies on the day of (*or as at length set forth in the above-mentioned recorded charter, &c., forming the last investiture, or as at length set forth in any other recorded deed or conveyance. And in every case where there are any real burdens, conditions, provisions, or limitations proper to be inserted or referred to, insert them here, or refer to them in or as nearly as may be in the form of schedule (D)*]; and that the said C. D. [*or if the heir has not been previously named, here say*], and that C. D. [*here insert his name and designation*] is eldest son and nearest lawful heir(*h*) of the said E. F. [*or whatever relationship and character of heir the party holds, here state it*]. Therefore I hereby declare the said C. D. to be the heir entitled to succeed to the said E. F. in the said lands, to be holden of me and my successors in manner and for payment of the duties specified in the [*here specify or refer to if previously specified a charter or other writ containing the tenendas and reddendo. If the reddendo is different from that in the charter or other writ specified or referred to, or if the vassal should desire, specify the reddendo here*]. In witness whereof [*insert a testing clause in usual form*].

4. *Precept of* Clare Constat *by a Subject Superior.*

I, A. B. [*here insert name and designation of superior*]: Whereas, &c. [*as in No.* 1 *of this schedule*], it clearly appears that E. F. [*here insert the name and designation of the ancestor*] died last vest and seised as of fee in, &c. [*as in No.* 1 *of this schedule, down to and including the statement of the relationship and character of heir which the party holds*]; and that the said lands and others are holden of me and my successors, as superiors thereof, in free blench farm [*or* feu farm, *as the case may be*], for ever, for payment of [*here specify the reddendo*]. Therefore I desire any notary-public to whom these presents may be presented to give to the said C. D., as heir aforesaid, sasine of the lands and others above described. [*If there are conditions of entail, &c., or other burdens or qualifications, here add,* but always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses (*or* clause authorising registration in the register of tailzies), (*or* with and under the real burdens, conditions, provisions, and limitations, *as the case may be*), above specified *or* referred to, *as the case may be*]. In witness whereof [*insert a testing clause in usual form*].

5. *Writ of* Clare Constat *in Burgage Subjects.*

We, the provost and bailies of the burgh of [*insert name*], being the magistrates of said burgh, acting under and in terms of "The

(*h*) See note (*n*), p. 261.

Titles to Land Consolidation (Scotland) Act, 1868": Whereas it clearly appears that C. D. [*insert name and designation of the ancestor*] died last vest and seised as of fee in, &c. [*as in No. 1 of this schedule, down to and including the statement of the relationship and character of heir which the party holds*]: Therefore we hereby declare the said A. B. to have right to the said lands as heir foresaid. In witness whereof [*to be signed by the provost or acting chief magistrate for the time, and the town-clerk (or by one of the town-clerks where there are more than one), and tested in usual form.*]

It is no objection now to any precept or writ from Chancery, or of *clare constat*, that the character in which an heir is entitled to succeed is erroneously stated therein, provided such heir was in truth entitled to succeed to the lands specified therein.(*i*)

A precept or writ of *clare constat* may be challenged at any time within twenty years.(*j*)

275. Subjects which formerly vested at common law.—Previous to the passing of the Conveyancing Act, 1874, the following subjects vested in the person of an apparent heir by survivance without service: The udal lands of Orkney and Shetland(*k*), allodial lands(*l*), unregistered leases(*m*), titles of honour and hereditary offices(*n*), moveables made heritable by destination(*o*), rights to rents and proceeds of heritage(*p*), and all rights having a tract of future time, as usufructuary interests in personal property, pensions, &c.(*q*), also *jus crediti* under marriage-contracts(*r*); but where the beneficiary entitled to heritage under marriage-contracts or trust settlement died intestate after the period of vesting and before obtaining a conveyance from the trustees, a general service was necessary to vest the right in *his* heir-at-law, although the feudal title was vested in the trustees.(*s*)

(*i*) 37 & 38 Vict. c. 94, § 11.
(*j*) 37 & 38 Vict. c. 94, § 34.
(*k*) M'Laren, § 181; Bell's Prin. § 1825.
(*l*) Bell's Lect. p. 999.
(*m*) *Murdoch*, 27th Jan. 1863, 2 Macph. 330.
(*n*) Ersk. 3, 8, 77.
(*o*) *Veitch*, 25th May, 1808, F. C.
(*p*) Bell's Prin. § 1682.
(*q*) Bell's Prin. § 1681.
(*r*) *Ogilvie*, 16th Dec. 1817, F. C.
(*s*) *Buchanan*, 15th May, 1862, 22 D. 979; M'Laren, § 183.

INTESTATE SUCCESSION

IN

REAL ESTATE IN ENGLAND.

276. Governing Statutes.—The statutes governing the present law of inheritance in England are 3 & 4 Will. IV. c. 106, and 22 & 23 Vict. c. 35—the former passed in the year 1833, and the latter in 1859.

For the rules of descent prior to 1833 the reader is referred to the "Commentaries of Blackstone,"(*a*) and to Watkin's "Essay on the Law of Descent."

The following is a summary of the present rules of descent(*b*):—

277. First Rule.—That inheritances shall, in the first place, lineally descend to the issue of the last purchaser in *infinitum.*

The term "purchaser" implies every person who takes otherwise than by descent; and descent is in every case traced from the last *purchaser* or the last person entitled *who did not inherit.*

Where there is a total failure of heirs of the purchaser, or where any land is descendible as if an ancestor had been the purchaser thereof, and there is a total failure of the heirs of such ancestor, the descent is traced from the person last entitled to the land as if he had been the purchaser.(*c*) Thus, the purchaser may die intestate, leaving an only child and no other relation: on the child's death also intestate there would be a total failure of the heirs of the purchaser; but if the child should have relations on the side of his mother, or if his mother should be living, they would succeed in the order mentioned in the Sixth Rule.

278. Second Rule.—That the male issue shall be admitted before the female.

279. Third Rule.—That where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest only shall inherit, but the females shall inherit all together. Thus,

(*a*) 2, 14.
(*b*) Abridged from Williams on Real Property, 7th Ed. pp. 92-107.
(*c*) Paterson's Comp. § 755.

if a man has two sons, A. and B., and two daughters, C. and D., A. excludes B. according to the Third Rule, and he excludes C. and D. according to the Second Rule, even if C. and D. should be his seniors in years. If, however, A. should be dead without issue, B. would exclude C. and D. by the Second Rule; but if B. also should be dead without issue, C. and D. would succeed in equal shares by the Third Rule.

Females or their heirs taking equal shares as co-heirs in the inheritance are called in law coparceners or parceners, a term derived from the circumstance that the law will constrain them to make partition. The eldest daughter or parcener, unlike the eldest heir female in the law of Scotland,(*d*) is not exclusively entitled to the whole of the mansion-house on the country estate, nor to the custody of the title-deeds, nor to a peerage dignity or title of honour, the latter being in abeyance until the Crown prefer one of the sisters.(*e*)

Coparceners do not by partition become *purchasers*, but continue to be entitled by descent.

280. Fourth Rule.—That all the lineal descendants in *infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living. Thus, in the case above mentioned, if A. the eldest son was dead leaving a son, that son would exclude his uncle B. and his aunts C. and D.; or if A. left a son and daughter, such daughter, after the death of her brother without issue, would exclude B., C., and D.

281. Fifth Rule.—That on failure of lineal descendants or issue of the purchaser, the inheritance shall descend to his nearest lineal ancestor.

282. Sixth Rule.—That the father and all the male paternal ancestors of the purchaser, and their descendants, shall be admitted before any of the female paternal ancestors or their heirs; all the female paternal ancestors and their heirs, before the mother or any of the maternal ancestors, or her or their descendants; and the mother and all the male maternal ancestors, and her and their descendants, before any of the female maternal ancestors or their heirs. Thus, the father takes first where the issue of the purchaser has failed. If the father be dead, his sons, other than the purchaser,

(*d*) § 247 *supra*.

(*e*) Paterson's Comp. § 777.

and being the brothers of the purchaser, take in the place of the father according to the Fourth Rule, unless they are of the half blood to the purchaser, which case is provided for by the next rule.

283. Seventh Rule.—That a kinsman of the half blood shall be capable of being heir; and that such kinsman shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman, when the common ancestor is a male; and next after the common ancestor, when such ancestor is a female.

284. Eighth Rule.—That in the admission of female paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to the mother of a less remote male paternal ancestor, and her heirs; and in the admission of female maternal ancestors, the mother of the more remote male maternal ancestor, and her heirs, shall be preferred to the mother of a less remote male maternal ancestor, and her heirs.

The first four of the preceding Rules apply as well to the descent of an estate tail,(*f*) if not duly barred, as to that of an estate in fee-simple. The remaining Rules apply exclusively to the descent of an estate in fee-simple.

285. Vesting of Real Estate.—When a possessor of real estate dies intestate, the estate vests in the heir-at-law without any process or form of law, subject to the debts of the ancestor; but the heir is not liable for these debts beyond the value of the estate to which he succeeds.

(*f*) See § 209 for definitions of estates in English law.

TAXES ON SUCCESSION.

286. Generally.—For purposes of revenue certain duties have been imposed by the Legislature on the property of every deceased person in passing to his next-of-kin or successors.

These duties consist of—(1.) The duty on inventories of personal property; (2.) The duty on legacies and residues of personal property; and (3.) The duty on heritable or real property.

The duty on inventories having been already noticed,(*a*) we shall here note very briefly the leading principles governing the imposition and collection of the other two duties.

In successions to personal property, the duty is payable at the legacy-duty office of the county or district within which the deceased died domiciled, irrespective of the situation of the property; and in successions to heritable property, at the office within whose bounds the estate is situated, irrespective of the domicile of the deceased proprietor; or in both cases, as regards Scotch successions, at the Inland Revenue Office in Edinburgh.

The manner of imposing the duty on personal estate is different from the manner of imposing it on heritable estate.

Upon personal estate there is imposed, as a general rule,(*b*) in addition to the inventory duty already mentioned, a legacy duty, regulated in amount by a scale adjusted to the compound ratio of the distance of the relationship between the deceased and his successors and the totality of the succession.

Upon heritable estate no inventory duty is imposed; but a succession duty is imposed in this way: The interest of the successor is considered as in the nature of an annuity for his or her own life, and the rule is to capitalise that annuity according to the tables annexed to the Succession Duty Act of 1853,(*c*) and to pay duty on such capitalised value at the same rates as are imposed on personal estate.

Legacy duty is thus distinct in character from succession duty. Each attaches to different property; consequently no person is liable to be charged with both duties in respect of the same property.

Generally, legacy duty is payable upon legacies and clear residues

(*a*) § 156.

(*b*) See exceptions stated in the following section.

(*c*) 16 & 17 Vict. c. 51; printed *infra*.

of *personal* estate accruing either by *will*, or upon intestacy, and upon moneys arising from the *sale* of heritable property.

Succession duty, again, is charged in the case of persons dying after 19th May, 1853, in the manner of legacy duty upon all *heritable* property devolving *by will*, and upon *heritable* or *personal* property devolving by reason of death *under any deed*, other than by will or intestacy.(*d*)

In other words, succession duty is imposed upon all property, heritable and personal, passing by death, which is not liable to the duty imposed by the Legacy Duty Acts.

Annuities are taxed somewhat after the manner of the taxation of heritable property; in the case of those commencing to be payable on the death of persons dying after 19th May, 1853, the rule is to value the annuity for duty according to the tables annexed to the Succession Duty Act.

These general principles will be better understood if we briefly advert to the provisions, firstly, of the Legacy Duty Acts, and secondly, of the Succession Duty Act; and as the rates, conditions, and exceptions of the several Acts are the same in regard to both testate and intestate successions, it will be convenient and perhaps useful to treat the subject in its entirety.

I. The Legacy and Residue Duties.

287. The Legacy Duty Acts.—Originally the duties on personal property devolving under a will or an intestacy were imposed in the year 1780, by the Act 20 Geo. III. c. 28.

The duties so imposed were accumulated and increased in the year 1783 by the Act 23 Geo. III. c. 58, and again in the year 1789 by the Act 29 Geo. III. c. 51.

The principle of taxation under these Acts was a stamp duty on receipts for legacies according to the value of the legacies.

As this principle admitted of the payment being evaded, the duties were transferred in the year 1796 from the receipts to the property itself by the Act 36 Geo. III. c. 52.

This last Act first introduced rates of duties varying according to the degree of relationship between the deceased and his legatee or next-of-kin, but continued in force the powers of the former Acts relating to stamps.(*e*)

(*d*) 16 & 17 Vict. c. 51.

(*e*) 36 Geo. III. c. 52, § 42.

The new duties were imposed on every legacy of the value of £20, and clear residue of £100, out of the personal estate of persons dying after the passing of the Act. The words of the Act are: "Upon every legacy, specific or pecuniary, or of any other description of the amount or value of £20 or more, given by any will or testamentary instrument of any person who shall die after the passing of this Act out of the personal estate of the person so dying, and also upon the clear residue, and upon every part of the clear residue of the personal estate of every person who shall so die, whether testate or intestate, and leave personal estate of the clear value of £100 or upwards which shall remain after deducting debts, funeral expenses, and other charges, and specific and pecuniary legacies (if any) whether the title to such residue, or to any part thereof, shall accrue by virtue of any testamentary disposition or upon intestacy."(*f*)

This Act was not therefore retrospective in its operation, but the liability to duty under the former Acts remained as to estates passing previous to 27th April, 1796.

The rates of duty imposed by this last Act were as follows:—

Where the legacy or residue should pass—

To a brother or sister of the deceased, or any of their descendants, ...	2 per cent.
To a brother or sister of a father or mother, or any of their descendants, ...	3 „
To a brother or sister of a grandfather or grandmother, or any of their descendants, . .	4 „
To persons in any other degree of collateral consanguinity, or strangers in blood, . .	6 „

These duties were increased by the Act 44 Geo. III. c. 98 to $2\frac{1}{2}$, 4, 5, and 8 per cent. respectively, as to all legacies and residues of the aforesaid amounts which should be paid or otherwise satisfied after 10th October, 1806.

By the 45 Geo. III. c. 28, which was passed in the year 1805, a duty at the rate of 1 per cent. was imposed on legacies and residues passing to lineal descendants, and an additional duty of 2 per cent. upon legacies and residues previously liable to the rate of 8 per cent. It also extended the liability to duty to legacies respectively amounting to £20 or upwards, charged upon or made payable out of any real estate, or out of any monies to arise

(*f*) § 2 of Act.

from the sale or mortgage of real estate, and the residue of monies arising from the sale or mortgage of real estate directed by the will, or other testamentary instrument of any person dying after the passing of the Act (5th April, 1805), to be sold or mortgaged, provided the real estate so directed to be sold should be of the clear value of £100 in the whole after deducting debts and other charges.(*g*)

The Act 48 Geo. III. c. 149, which was passed in the year 1808, continues the rates of duties on legacies imposed by the 44 Geo. III. c. 98, and the 45 Geo. III. c. 28, but made *every share of residue* of the value of £20 or upwards liable to the duty without regard to the aggregate amount of the estate.

The Act 55 Geo. III. c. 184, which was passed in the year 1815, regulates in part the existing duties; it preserves, as to property derived from persons who have died previous to 5th April, 1805, the rates of duty imposed by the 44 Geo. III. c. 98; and as to property derived from persons dying subsequent to that date, it increases the three intermediate rates to 3, 5, and 6 per cent. respectively, leaving the lowest and highest rates as they previously stood at 1 and 10 per cent.

The 48 Geo. III. c. 149 and 55 Geo. III. c. 184 repealed the existing duties merely, leaving in force the machinery for regulating the mode of collecting the duties, and the time and manner of payment, provided by the previous Acts of 36 Geo. III. c. 52 and 45 Geo. III. c. 28.(*h*)

These last five Acts have been affected by subsequent legislation to the extent and effect shown in the following tabular view :—

Act Affected.	How Affected.	Affecting Act.
36 Geo. III. c. 52 (1796),	§§ 1, 2, 3, 7, 36 repealed, .	35 & 36 Vict. c. 63 (1872).
	§ 40 repealed, . . .	34 & 35 Vict. c. 116 (1871).
	§ 42 repealed, . . .	35 & 36 Vict. c. 63 (1872).
	§ 43 repealed in effect, .	31&32Vict.c.124(1868).(*a*)
	§§ 45, 46, and the Schedule of Tables for valuing Annuities, &c., as specified on page 438 below, ...	34 & 35 Vict. c. 116 (1871).
44 Geo. III. c. 98 (1804),	The whole Act repealed except so far as it relates to duties on medicines and licenses for vending same, .	33 & 34 Vict. c. 99 (1870). 35 & 36 Vict. c. 63 (1872).

(*g*) § 5 of Act. | (*h*) § 8 of each Act.

(*a*) §§ 10, 11, and 12 of this Act repealed by 33 & 34 Vict. c. 99 (1870).

Act Affected.	How Affected.	Affecting Act.
45 Geo. III. c. 28 (1805),	The whole Act repealed, excepting § 5, § 7, "from all the provisions," to the end of it, and § 12, . . .	35 & 36 Vict. c. 63 (1872).
48 Geo. III. c. 149 (1808),	§§ 1 to 34, both inclusive, and 45, 48, 49, repealed, . .	33 & 34 Vict. c. 99 (1870).
	§§ 43, 46, 47 repealed, . .	35 & 36 Vict. c. 97 (1872).
55 Geo. III. c. 184 (1815),	§ 1, also § 2 except as far as it relates to legacy and residue duties, and §§ 3 to 20 both inclusive repealed, . .	33 & 34 Vict. c. 99 (1870).
	§ 23 repealed, . . .	37 & 38 Vict. c. 35 (1874).
	§§ 25, 26 repealed, . .	36 & 37 Vict. c. 91 (1873).
	§§ 29, 30, 31 repealed, . .	33 & 34 Vict. c. 99 (1870).
	§§ 32, 33, 34, 35, 36 repealed,	32 & 33 Vict. c. 14 (1869).
	The words "ordinary or" in § 52 and § 55 repealed, .	36 & 37 Vict. c. 91 (1873).
	Part 1 of Schedule as regards legacy, &c., duties, and Part 2 repealed, ...	33 & 34 Vict. c. 99 (1870).

The 43 Vict. c. 14(*i*) exempts from legacy-duty the personal estate of any person dying after 24th March, 1880, which does not amount to the sum of £100.

The 44 Vict. c. 12(*j*) provides that the 1 per cent. legacy and succession duty payable by children and others, under the Legacy and Succession Duty Acts, shall not, in cases where the original inventory was recorded subsequent to 1st June, 1881, be payable out of any personal property included in the inventory, and on which the stamp duty has been paid. This does not apply to legacies or successions out of heritable property, or out of foreign assets, or to heritable property; nor does it apply to the duties payable by the other relatives of the deceased or strangers in blood. The same Act(*k*) also charges pecuniary legacies and shares of residue below £20 in value where the deceased died on or after 1st June, 1881, with the duty imposed by the Legacy Duty Acts, subject to the relief granted by the above Act 43 Vict. c. 14, as to personal estate not exceeding in value £100, as modified by § 36 of the 44 Vict. c. 12, which section affords relief from legacy duty in

(*i*) § 13 of Act.
(*j*) § 41 of Act. See the Acts printed *infra*.
(*k*) § 42 of Act.

cases where the gross personal estate does not exceed £300 in value.

288. Application of Legacy Acts.—The Acts apply only to persons who are British subjects with reference to their place of domicile. As explained in a previous part of this work, the distribution of personal estate is governed by the law of the owner's domicile, while the succession to heritable estate is governed by the law of the situation of the estate. It follows that the personal property of British subjects, wherever the property is situated, is liable to legacy-duty. The duty, however, does not affect legacies given out of heritable estate situated abroad, notwithstanding that the owner dies domiciled in this country; but legacies given out of heritable estate in this country are liable to the duty notwithstanding that the owner dies domiciled abroad.

289. What deemed a Legacy within meaning of Legacy Duty Acts.—At common law a legacy is a benefit under a will, the person benefited being styled the legatee. Legacies are of two kinds—specific and general. The former is a bequest of a particular thing, specifically described, as certain articles of plate, furniture, jewellery, &c.; while the latter is a mere bequest of quantity, as a legacy or annuity to be paid out of the general estate. Specific legacies have this advantage over general legacies, that, in case of deficiency of assets, they are to be satisfied in preference to the general legacies, but they suffer a proportionable abatement where the assets are insufficient to pay the debts.

By the 36 Geo. III. c. 52(*l*), a legacy was in substance defined as any gift by will which should be satisfied out of the personal estate of any person dying after the passing of the Act, or out of the personal estate which such person should have power to dispose of, whether given by way of *annuity* or in any other form, and whether charged on personal estate only, or charged also on real estate (except so far as the same should be satisfied out of the real estate). A *donatio mortis causa*(*m*) was also a legacy.

Under this section it has been held that a legacy was created by the forgiveness of a debt; by a gift to an executor for his

(*l*) § 7 of Act, afterwards repealed as above.

(*m*) This means a gift in contemplation or anticipation of death, there being an implied trust that if the donor recovers, the property shall revert to him.

personal trouble; by a direction to pay another person's debts; by a direction to pay interest on debts; by a gift of maintenance, but not by a direction to pay the testator's own debts, nor by a mere authority in a will to make professional charges.(*n*)

By 45 Geo. III. c. 28(*o*), a legacy was substantially defined as a gift, by any will or testamentary instrument, of any person dying after the passing of the Act, which should have effect, or be satisfied, out of the personal estate of any such person, or out of the personal estate which any such person should have power to dispose of as he or she should think fit, or which should be charged upon, or made payable out of any *real* estate, or out of any moneys to arise from the sale of real estate, whether the same should be given by way of annuity, or in any other form. Provided always, that nothing therein contained should be construed to extend to the charging with the duties by this Act granted, any specific sum or sums of money, or any share or proportion thereof, charged by any marriage settlement, or deed upon real estate, in any case in which such specific sum or share, or proportion thereof, should be appointed or apportioned, by any will or testamentary instrument, under any power given for that purpose by such marriage settlement or deed.

It will be observed that this section rendered ineffectual the above-bracketed passage in 36 Geo. III. c. 52.

The operation of the above proviso in regard to marriage settlements may be illustrated thus: The proprietor of an heritable estate, charges it under his marriage settlement with the sum of £1000 in trust for his wife in liferent and his children in fee, but giving the wife power to apportion the fee among the children as she thinks fit. The £1000 is not liable to legacy duty under the wife's will, as it falls to the children under the marriage settlement, the wife having only power to apportion; had she power to bequeath to whom she might choose, duty would be exigible.

Under this last section it has been held that a legacy was created by the gift of an annuity or clear yearly rent charge out of a real estate; by a perpetual legal rent charge out of real estate to the first taker, subsequent takers paying succession duty; and by a gift of the next presentation to a church living.

The above terms of definition of a legacy were extended by 8 &

(*n*) Hanson, pp. 61-66.

(*o*) § 4 of Act, afterwards repealed as above.

9 Vict. c. 76(*p*), which provides in substance that, after the passing of the Act, every gift by any will or testamentary instrument of any person which shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath, had, or shall have had power to dispose of, or which gift is, or shall be payable, or shall have effect, or be satisfied out of, or is or shall be charged or rendered a burden upon, the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof, which such person hath, had, or shall have had any right or power to charge, burden or affect with the payment of money, or out of or upon any moneys to arise by the sale, burden, mortgage, or other disposition of any such real or heritable estate, or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a donation *mortis causa*, shall be deemed a legacy. Provided always that no sum of money which, by any marriage settlement, is subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, shall be liable to the duties on legacies under the will in which such sum is appointed or apportioned in exercise of such limited power.

The sum of these definitions is that all gifts by will, whether out of heritable or personal estate, and whether gifts of annuities, or of specified sums of money, which are made by way of appointment in exercise of any *general* power for that purpose, however created, are legacies, under the will of the person by whom the power is exercised. And the exercise of a *limited* power created by will, confers also a legacy under *that* will, whatever may be the nature of the deed by which the appointment is made. It is the deed by which the power is created, and not the deed by which it is exercised, that governs the exercise of such limited power.(*q*)

290. Description of Property Liable to Legacy Duty.—Previous to the year 1805, legacy duty affected only property of a purely personal character.(*r*) But in that year(*s*) the area of taxation was extended to the proceeds of heritable estate directed under a

(*p*) § 4 of Act. §§ 2 and 3 of this Act repealed by 33 & 34 Vict. c. 99 (1870), and § 1 from "from" to "thereof," and § 6, repealed by 38 & 39 Vict. c. 96 (1875).

(*q*) Hanson, p. 19.

(*r*) 36 Geo. III. c. 52, § 2, now repealed as above.

(*s*) 45 Geo. III. c. 28, § 1, now repealed as above.

will to be sold, and to gifts by will made chargeable upon or taking effect *out* of heritable estate, as distinguished from gifts *of* the heritable estate itself. At this time, every legacy of the value of £20 or upwards, whether payable out of heritable or personal estate, was liable to duty without regard to the total value of the deceased's estate; but in order to render personal estate, or the proceeds of sale of heritable estate directed to be sold, liable to duty as *residue*, the whole residue required to amount to not less than £100, and if it amounted to or exceeded that sum, duty was payable in respect of the amount, without regard to the individual shares in which it was distributed.(*t*)

Thereafter, by 48 Geo. III. c. 149, legacies and shares of legacies were put upon the same footing as respects the liability to duty, such being chargeable for every legacy of the amount or value of £20 or upwards, and for every residue, or share of residue, amounting to £20 or upwards.

Again, whilst by the 55 Geo. III. c. 184 the rates of duty imposed by the last-mentioned Act were increased, no alteration was made in the description of the property taxable, beyond this, that each of two or more distinct legacies to the same person, if collectively of the value of £20, are chargeable with duty, though separately under that amount.

In a schedule annexed to the last-mentioned Act, the property belonging to a person dying after 5th April, 1805, liable to legacy duty, is described as follows:—

For every legacy, specific or pecuniary, or of any other description, of the amount or value of £20 or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any moneys to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815:

Also for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving to two or more persons), of the personal or moveable estate of any person who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total

(*t*) Hanson, p. 12.

intestacy; where such residue or share of residue shall be of the amount or value of £20 or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815:

And also for the clear residue (when given to one person), and for every share of the clear residue (when given to two or more persons), of the moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any), where such residue or share of residue shall amount to £20 or upwards, and where the same shall be paid, retained, or discharged after the 31st day of August, 1815.

By the Customs and Inland Revenue Act, 1880,(*u*) personal estates of persons dying after 24th March, 1880, whose gross value does not exceed £100, are exempted from legacy duty; and by the Customs Act, 1881,(*v*) estates of persons dying after 1st June, 1881, not exceeding £300 in gross value, are relieved from legacy or succession duty on payment of a stamp duty of 30s., on the inventory of the personal estate; but it imposes duty on legacies under £20.

291. Mode of Calculating Duty.—The 48 Geo. III. c. 149, and the 55 Geo. III. c. 184,(*w*) repealed the existing duties merely, leaving the other provisions of the previous Acts in force; consequently the mode of calculating the legacy duty is regulated by the previous Acts.

The leading Act in this respect is the 36 Geo. III. c. 52, and it provides for the calculation of the duty in the following cases:—

1. *Gifts of Capital.*—The duty is calculated on the amount or value of the legacy or succession, and is payable at once.(*ww*)

2. *Gifts by way of an Annuity.*—

(1.) Annuity for Life or Years.—The value of any legacy given by way of annuity, whether for any life or lives, or for any term of years, shall be calculated according to the tables provided for that purpose by the Succession Duty Act,(*x*) and the duty thereon paid by four equal payments out of the annuity, the first of which shall be made on completing the first year's annuity, and in like manner with the three succeeding years respectively; and the value of such

(*u*) 43 Vict. c. 14, § 13.
(*v*) 44 Vict. c. 12, §§ 36, 42.
(*w*) § 8 of each Act.
(*ww*) §§ 6, 17 of Act.
(*x*) 16 & 17 Vict. c. 51, § 31.

annuity shall be calculated without regard to any contingency besides death. But if any such annuity shall determine *by death* before four years' payments become due, then the duty shall be payable in proportion only to such payments of the annuity as may be actually due; and where any annuity shall determine upon any other contingency, then not only all payments of duty which would otherwise become due shall cease, but a return may be obtained of so much of the duty previously paid as will reduce it to the amount of duty payable for such annuity calculated (according to the said tables) for the term it shall have endured.(*y*)

(2.) Annuity Payable out of a Legacy.—The value of any legacy given by way of annuity, and payable out of another legacy, shall be valued, and the duty charged thereon in the same manner as any other annuity; and the duty on such legacy shall be payable on the amount thereof after deducting the value of the annuity.(*z*)

(3.) Sum Bequeathed to Purchase an Annuity.—The duty on a legacy given by directing executors to purchase an annuity of a certain amount shall be calculated upon the sum necessary to purchase such annuity, according to the said tables, and shall be deducted from such sum, and paid as on an absolute bequest, and the annuity to be purchased shall be reduced in proportion to the duty payable thereon.(*a*)

(4.) Benefits Incapable of Valuation.—Where any benefits shall be so given that the amount or value can only be ascertained from time to time by the actual application of the allotted fund; or where the amount or value of such benefit cannot, by reason of the form or manner of the gift, be immediately ascertained—the duty shall be charged on the sums which shall be applied from time to time, as separate and distinct legacies, and shall be paid out of the fund applicable for such purposes, or charged with answering the same.(*b*)

3. *Gifts to Several Persons in Succession.*—The duty on a legacy or residue given to be enjoyed by different persons in succession, all of whom shall be chargeable with the *same rate of duty*, shall be paid as in the case of an absolute bequest; but

(*y*) 36 Geo. III. c. 52, § 8. See pp. 414-426 *infra* for examples of the various cases of the imposition of duty noted in this section.

(*z*) *Ibid.* § 9.

(*a*) *Ibid.* § 10.

(*b*) *Ibid.* § 11.

where a legacy shall be given to be enjoyed in succession by persons chargeable with *different* rates of duty, those who shall be entitled for life, or for any other temporary interest, shall be charged with duty by way of annuity, as the parties respectively become entitled, and those who first become absolutely entitled, or who take when all the successions shall first become liable to the same rate of duty, shall pay duty for the same in the same manner as if it had been given immediately.

Where any partial interest shall arise out of such property so to be enjoyed in succession, the duty thereon shall be charged and paid as before stated in the case of an annuity payable out of a legacy, and in like cases of partial interests.(*c*)

No duty shall be paid on plate, furniture, or other effects not yielding income, given to be enjoyed by different persons in succession, till the same shall be sold, or shall come to some person having power to sell or dispose thereof, or having an absolute interest therein; and shall be then charged on that person only, who shall be responsible for the duty instead of the executors.(*d*)

Where a legacy shall be so given by any will or testamentary instrument, that different persons shall become entitled thereto in succession, the duty shall be charged thereon as if given to be enjoyed in succession, whether such person shall take under such will or testamentary instrument, and its dispositions, or in default of such dispositions, and as entitled by intestacy.(*e*)

4. *Legacies in Joint-tenancy.*—Where a legacy shall be given to persons in joint-tenancy, some or one of whom may be chargeable, and any other or others not chargeable with duty, those who may be chargeable shall pay duty in proportion to their respective interests; and should the persons so chargeable afterwards become entitled by survivorship, or by severance of the tenancy, to a larger interest, they shall then pay duty on such increased interest.(*f*)

5. *Legacies subject to Contingencies.*—Where a legacy shall be given subject to a contingency which may defeat the gift, and whereupon the same may go to another person, such legacy, unless chargeable as an annuity, shall be charged with duty as an absolute bequest, notwithstanding the same may, on such contingency happening, go to a person not chargeable with the same duty, or with any duty. And should the legacy, on such contingency happening, go to a person liable to a higher rate of duty, such person

(*c*) 36 Geo. III. c. 52, § 12.
(*d*) *Ibid.* § 14.
(*e*) *Ibid.* § 15.
(*f*) *Ibid.* § 16.

shall pay the difference between the duty before paid, and such higher rate of duty.(*g*)

6. *Legacies subject to Power of Appointment.*—Where legacies shall be subject to a power of appointment in favour of persons specially named, such legacies shall be charged with duty as if given in succession; and where any limited interest shall be given in any property, with a general and absolute power of appointment to persons to whom the same *would not belong* in default of appointment, such property, on the execution of the power, shall be charged with the same duty as if the same had been immediately given to the person executing such power, after allowing any duty before paid in respect of the limited interest. And where property shall be given with a general and absolute power of appointment to persons to whom the same *would belong* in default of appointment, such persons shall be charged with duty as if the same had been bequeathed to them absolutely.(*h*)

7. *Upon Money directed to be laid out in Land.*—Money, or other personal estate, directed to be laid out in the purchase of real estate, shall pay duty as an absolute bequest of personal estate, unless the same shall be given so as to be enjoyed by different persons in succession; and then each person in succession shall pay duty as if the same had not been directed to be laid out in the purchase of real estate, unless the same shall be applied in the purchase of real estate before such duty accrued; but if before the same, or some part thereof, shall be so laid out, any person shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been previously applied, the same duty which ought to have been paid by such person, if absolutely entitled thereto as personal estate, shall be raised and paid out of the fund remaining to be applied.(*i*)

8. *Estates* pur autre vie.—An estate *pur autre vie* signifies an estate for another's life. If such estate be limited to testator and his heirs, it is heritable estate, and if not disponed to others would descend to the heir-at-law; but if limited to executors, it is personal property, and shall be chargeable with duty accordingly.(*j*)

The 45 Geo. III. c. 28(*k*) makes the above provisions applicable to legacies and moneys arising by the sale of heritable estate.

(*g*) 36 Geo. III. c. 52, § 17.
(*h*) *Ibid.* § 18.
(*i*) *Ibid.* § 19.
(*j*) *Ibid.* § 20.
(*k*) § 5 of Act.

292. Mode of ascertaining Duty on Property not reduced into Money.—The duty on specific legacies, as furniture, ships, jewellery, or other property handed over or assigned to the legatees without being converted into money, is by Statute(*l*) levied by a very complex method; but the practice now is to require production of an appraisement or valuation, which is filed in the Legacy Duty Office along with the residue account; such appraisements are exempted from stamp duty.(*m*)

293. Rates of Duty.—Where the deceased died *after* 5th April, 1805, whether testate or intestate, the duty on the amount of every legacy, annuity, residue, &c., is as follows (*n*):—

To children of the deceased(*o*), and their descendants, or to the father or mother, or any lineal ancestor of the deceased, or to the husbands or wives of any such persons, . . .	£1 per cent.
To brothers and sisters of the deceased, and their descendants, or to the husbands or wives of any such persons, ...	£3 „
To brothers and sisters of the father or mother of the deceased, and their descendants, or to the husbands or wives of any such persons, .	£5 „
To brothers and sisters of a grandfather or grandmother of the deceased, and their descendants, or to the husbands or wives of any such persons, ...	£6 „
To any person in any other degree of collateral consanguinity, or to strangers in blood to the deceased, ...	£10 „

The husband or wife of the deceased is not subject to duty.

The 44 Vict. c. 12, § 41, provides that the one per cent. Legacy and Succession Duty payable by children and others, under the Legacy and Succession Duty Act, is not payable in respect of any personal property included in an original inventory recorded subsequent to 1st June, 1881, and on which the stamp duty has been paid. This does not apply to legacies or successions out of heritable property or out of foreign assets, or to heritable property;

(*l*) 36 Geo. III. c. 52, § 22.
(*m*) 34 & 35 Vict. c. 103, § 26.
(*n*) 55 Geo. III. c. 184.
(*o*) This applies only to *lawful* children of the deceased, illegitimate children being subject to duty at the rate of 10 per cent.

nor does it apply to the duties payable by the other relatives of the deceased or strangers in blood; the legacy and succession duties payable by these persons remain the same.

Sec. 42 of the above Act charges pecuniary legacies and shares of residue below £20 in value, where the deceased died on or after 1st June, 1881, with the duty imposed by the Legacy Duty Acts, subject to the reliefs mentioned above (§ 287).

294. Mode of Collecting Duty.—The collecting of the duty upon legacies and residues is mainly regulated by the 36 Geo. III. c. 52.

The Commissioners of Inland Revenue fall to prepare proper stamps, denoting the different rates of duty payable; and to do all things necessary for carrying the Act into execution.(*p*) They also appoint proper persons in the different counties to collect and receive the duties imposed; which duties are to be transmitted to the head office, and duly entered in their books, in which shall be kept proper accounts, so that it may at all times appear what duties shall have been paid.(*q*) They are also to provide forms of receipts for legacies and residues(*r*), which, when filled up, shall express (*s*)—(1) the date of the receipt; (2) the name of the testator or intestate; (3) the name of the person to whom the receipt is given; (4) the name of the person receiving the legacy, &c.; (5) the amount of the legacy; and (6) the amount and rate of the duty payable thereon. The accountable persons are prohibited from distributing any part of the property without taking a receipt containing these several particulars.(*t*) And they are required to bring the receipt to the Commissioners within twenty-one days after its date, in order that it may be stamped and the duty paid(*u*); and in default they are subjected to a penalty of ten per cent. upon the amount of the property distributed; and the person to whom they hand over the property is also made liable to a similar penalty if he omits to give a receipt in the form required.

The Commissioners may stamp the receipt after the expiration of twenty-one days, and within three calendar months from its date, upon payment of a penalty of 10 per cent. on the amount of the duty; but they are absolutely prohibited from stamping a

(*p*) 44 Vict. c. 12, § 26.
(*q*) 36 Geo. III. c. 52, § 4.
(*r*) *Ibid.* § 5. See also §§ 304-306 *infra.*
(*s*) *Ibid.* § 27.
(*t*) *Ibid.* § 27.
(*u*) *Ibid.* § 29.

receipt after the expiration of the said three months.(*v*) But the stringency of this enactment is relaxed by a subsequent statute(*w*); and the result now is, that within twenty-one days from the date of a receipt, it may be stamped on payment of the duty only; after twenty-one days, and within three calendar months, it may be stamped on payment of the duty and ten per cent. thereon by way of penalty; but after the expiration of the three calendar months, it can only be stamped on payment of the duty, and of ten per cent. on the amount of the property for which the receipt is given.(*x*)

Where too little duty has been paid for any legacy or residue by mistake, if application be made to the Commissioners within three calendar months after such duty was paid by mistake the Commissioners may receive the difference with ten per cent. thereon by way of penalty, and cause the receipt to be properly stamped as if the full duty had been originally paid.(*y*)

Where, by reason of infancy, or absence beyond sea, of the party entitled thereto, the executor cannot pay any legacy or residue, although he may have assets, he may pay the same, deducting the duty, into the Bank of England to the credit of the Accountant-General of the Court of Chancery, whose certificate of such payment is a sufficient discharge for the money so paid in. If too much duty has been paid, the Commissioners shall return the excess.(*z*)

Where the executor shall be entitled to any legacy, residue or share thereof, he shall be chargeable with duty on retaining the same, and shall before retaining transmit the particulars and value thereof, and the duty offered thereon, to the Commissioners, who shall assess the proper duty thereon, which shall be paid within fourteen days after such assessment, under a penalty of treble the amount of the duty.(*a*)

Where the executor is entitled to retain property in trust for other persons, it is the practice of the Commissioners to require the delivery of a general residue account of the deceased for the purpose of ascertaining whether any, and what duty is payable thereon, and to assess and accept the duty upon the footing of such account, as well in cases where the residue is stated to be

(*v*) 36 Geo. III. c. 52, § 29.
(*w*) 48 Geo. III. c. 149, § 44.
(*x*) Hanson, p. 35.
(*y*) 36 Geo. III. c. 52, § 30.
(*z*) *Ibid.* § 32.
(*a*) *Ibid.* § 35.

retained for the benefit of third persons, as in those where it is retained for the case of the executor himself.(*b*)

295. By whom Duties must be Paid.—In all cases, with the exceptions to be immediately noticed, the duty must be paid upon the executor retaining any legacy or residue, or any part thereof, either to his own use or for the benefit of others; and if any executor shall retain any part of any such legacy or residue without *having first paid* the duty thereon, or shall pay or otherwise satisfy any part thereof, *having first deducted* the duty thereon, the duty which shall not have been paid shall be a debt from such executor to Her Majesty; but if any such person shall pay or otherwise satisfy any part of any legacy or residue *without having first deducted* the duty, such duty shall be a debt to Her Majesty, both from the executor and the party entitled.(*c*)

The exceptions referred to are those to which an executor is not accountable for the duty—viz. (1), upon an annuity which is made payable out of some other legacy, the person entitled to the annuity being responsible therefor(*d*); (2) upon a legacy to different persons in succession which is handed over by him, before the duty has become due, to trustees under the will, the trustees being responsible therefor(*e*); (3) upon a gift of articles of plate, &c., not yielding income, to different persons in succession, the person having power to sell or dispose thereof, or having an absolute interest therein, being responsible therefor, instead of the executor.(*f*)

The duty continues so long as the claim of the Commissioners remains unsatisfied, although the accountable person may have paid over, or parted with, the property without deducting or receiving the duty; in which case, however, the Act makes the unpaid duty a debt of the person to whom, as well as of the person by whom, such payment or delivery is made. Moreover, the 13 & 14 Vict. c. 97(*g*) provides that any person who receives money for the duty upon any legacy or residue shall be accountable for the amount as a debt due to the Crown, and empowers the Court of Exchequer to require such person to account and pay such money accordingly.(*h*)

(*b*) 28 & 29 Vict. c. 104; Hanson, p. 36.
(*c*) 36 Geo. III. c. 52, § 6.
(*d*) *Ibid.* § 9
(*e*) *Ibid.* § 13.
(*f*) *Ibid.* § 14.
(*g*) § 8 of Act.
(*h*) Hanson, p. 50.

A legatee who becomes liable to pay the duty by reason of his having been paid his legacy without deduction is equally with the executor liable to pay such duty with interest, and this rule is equally applicable to the duty chargeable on gifts by way of annuity, and on successions in real property, which is payable by periodical instalments. The right of the Crown to interest at 4 per cent. in these cases is expressly affirmed by statute.(*i*)

Where legacies are charged upon or made payable out of heritable estate, the duties are to be paid by the trustees or the persons entitled to the heritable estate which is subject to the legacy, and must be retained by the person paying the legacy.(*j*)

296. Where Duty is Payable.—All legacy duties must be paid personally at the Inland Revenue Office in Edinburgh, or to a stamp distributor in the country; and the receipt, or account, in the officially-printed form, properly filled up for the legacy or residue to which such duty belongs, must at the same time be presented to be registered and stamped.(*k*)

297. When Duty must be Paid.—The duty must be paid at the time when the legacy or residue is transferred to or retained for the benefit of the person entitled.(*l*)

If the person entitled to the legacy or residue is an infant, or absent beyond the seas, the payment of the duty is not to be deferred till such legacy or residue is actually paid, but the duty is to be accounted for when the legacy or residue is so retained.(*m*)

In the case of a reversionary interest in personal estate subject to legacy duty, the duty is not payable until the property falls into possession, unless indeed by actual sale or in some other way, the value of it is sooner realised, so as to be capable of being handed over immediately to the person entitled, in which case the duty is payable at once for the amount which he actually receives.(*n*)

298. Interest payable on Arrears of Duty.—It has been the practice for a long time for the Legacy-Duty Office to require the accountable persons to include in their accounts, as well in respect of legacies as residue, interest upon the duty from the time when it fell due up to the date of payment; and by a recent statute(*o*)

(*i*) 31 & 32 Vict. c. 124, § 9; Hanson, p. 57.
(*j*) 45 Geo. III. c. 28, § 5.
(*k*) 36 Geo. III. c. 52, § 4.
(*l*) *Ibid.* § 6.
(*m*) *Ibid.* § 32.
(*n*) Hanson, p. 24.
(*o*) 31 & 32 Vict. c. 124, § 9.

the Commissioners are expressly authorised to charge interest at the rate of 4 per cent. per annum upon all arrears of legacy and succession duties, and to recover it as part of the duty itself.

299. Claims for Duty under a Will may be compounded.—If at the end of two years after the death of the deceased, it shall appear to the satisfaction of the Revenue Commissioners that it will require time to collect the debts or effects, or that it will be difficult to ascertain and adjust the amount of the residue, and the parties interested shall be desirous of compounding for the duties, the Commissioners may compound the duties if they think that the circumstances are such as to render it expedient to do so.(*p*)

The Commissioners may commute legacy or succession duty payable in respect of any interest in expectancy, upon the determination of a life or other temporary interest in possession, in a legacy or residue, or in personal property comprised in a succession, and the duty (if any) payable upon the life or other temporary interest shall have been fully paid and satisfied; and they may also assess and compound for the legacy duty under a will at any time, upon the delivery to them of an account showing the amount of the estate subject to duty, the names and descriptions of the persons entitled thereto, and their consanguinity to the testator.(*q*)

300. Exemptions from Legacy Duty.—These are (1) a legacy to the husband or wife of the deceased; (2) to any of the Royal Family(*r*); (3) a legacy of specific articles, such as books, prints, pictures, statues, gems, coins, medals, specimens of natural history, given to any body corporate for the purpose of preservation and not for sale(*s*); (4) any fund set apart for the payment of duty(*t*); (5) any legacy given by a testator in Ireland for the education and maintenance of poor children in Ireland, or for any purpose merely charitable in Ireland(*u*); (6) or any legacy or residue bequeathed out of the estate of a deceased depositor in any savings-bank not exceeding the value of £50.(*v*) It is not usual in practice to require payment of legacy duty upon any sum not exceeding £100, which, under the authority of the Regimental Debts Act, 1863, or

(*p*) 36 Geo. III. c. 52, § 33; 16 & 17 Vict. c. 51, § 39.

(*q*) 43 Vict. c. 14, § 11; 44 Vict. c. 12, § 43.

(*r*) 55 Geo. III. c. 184, Schedule.

(*s*) 39 Geo. III. c. 73, § 1, *infra*.

(*t*) 36 Geo. III. c. 52, § 21.

(*u*) Hanson, p. 216.

(*v*) 26 & 27 Vict. c. 87, § 41.

the Navy and Marines Property of Deceased Act, 1865, or the Acts relating to prize-money and civil pay and pensions, are paid over to the persons claiming to represent the deceased owners without confirmation being required.(*w*)

Children are now exempted from legacy and succession duty in respect of any personal property included in an inventory recorded after 1st June, 1881, and relief from duty is afforded in all cases where the gross value of the personal estate does not exceed £300.(*x*)

301. Repayment of Overpaid Duty.—If any legacy or residue of personal estate, or any part thereof, have been paid in error or otherwise, and shall be refunded, the duty will, upon due proof made on oath, be repaid.(*y*)

302. Penalties.—Any executor or other person responsible for the duties, paying or receiving any legacy, residue, or share of residue liable to duty, without taking or signing the proper receipt for the same, shall be subject to a penalty of 10 per cent. on the value of the legacy or residue.(*z*)

Every legacy receipt must be dated on the day of signing, and the duty paid within twenty-one days from its date, under a penalty of 10 per cent. on the amount of the duty; but if the duty be not paid within three months from the date of the receipt, a penalty will then be incurred of 10 per cent. on the amount or value of the legacy. Where the receipt is signed out of Great Britain, and is brought to be stamped within twenty-one days after it is received in this country, the penalty may be remitted.(*a*)

Executors, previous to retaining legacies payable to themselves, must send particulars thereof and pay the duty to the Commissioners within fourteen days after the same ought to be paid, under a penalty of treble the value of the duty.(*b*)

Any person who shall alter any receipt for the duties after the same shall have been signed by the officer, or shall utter or publish as true an altered receipt, shall be liable in a penalty of £500.(*c*)

In practice, however, interest is received on the unpaid duties in all but very exceptional cases, under the Act 31 & 32 Vict. c. 124. Section 9 of that Act provides that in any case in which duty payable in respect of any legacy or residue under the Legacy

(*w*) Hanson, p. 217.
(*x*) See § 293 *supra*.
(*y*) 36 Geo. III. c. 52, § 34.
(*z*) *Ibid.* § 28.
(*a*) *Ibid.* § 29; 48 Geo. III. c. 149, § 44.
(*b*) 36 Geo. III. c. 52, § 35.
(*c*) *Ibid.* § 39.

Duty Acts now in force, or in respect of any succession under the Succession Duty Act, 1853, is in arrear, the person by whom the arrears of duty may be payable shall be liable to pay interest thereon at the rate of 4 per cent. per annum; and such interest shall be recoverable in the same manner as the arrears of duty and as part thereof: provided always that the acceptance or recovery by the Commissioners of arrears of duty, with interest thereon, shall be an absolute waiver of the penalties (if any) which may have been incurred under the Legacy Duty Acts or the Succession Duty Act.

303. Discharge of Executor from Claim to Duty.—Where an executor shall give written notice to the Commissioners for any claim to legacy or succession duty in respect of any funds in his hands which he intends to distribute, and shall have delivered to them all particulars which they may require in order to ascertain the existence and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto after satisfaction of any claims to duty made by the Commissioners, and shall be entitled to receive from them a discharge from his liability to duty in respect of the fund.(*d*)

304. Legacy Receipt.—Subject to the provision in the preceding section, no legacy liable to duty is to be paid without a receipt containing certain particulars, and no receipt shall be available unless duly stamped.(*e*) Every legacy receipt must be dated on the day of signing, and the duty thereon paid within twenty-one days from the date thereof, under a penalty of 10 per cent. on the amount of the duty; and if the duty shall not be paid within three months from the date of the receipt, a penalty will then be incurred of 10 per cent. on the amount or value of the legacy.(*f*) The following is the form of receipt required at the stamp-office upon tendering the duty on legacies:—

FORM NO I.*—INLAND REVENUE, EDINBURGH.—*Receipt and Discharge for any Specific, Pecuniary, or other Legacy given out of Personal Estate, or out of or chargeable upon Real Estate, or out of Monies arising by the Sale or Burdening of Real Estate, and for the Residue, or any Share of Residue of Personal Estate, or*

* This form is for property chargeable under the Legacy Duty Acts. A separate form is supplied for property chargeable under the Succession Duty Act.

(*d*) 43 Vict. c. 14, § 12.
(*e*) 36 Geo. III. c. 52, § 27
(*f*) See § 302 as to penalties.

the Residue, or any Share of Residue of Monies arising by the Sale or Burdening of Real Estate, and given or devolving to, or for the benefit of any Child, or Descendant of any Child, or the Father or Mother, or any Lineal Ancestor, or to Collateral Relations, or Strangers in Blood to the Deceased, pursuant to Acts 36 *Geo. III. c.* 52, 45 *Geo. III. c.* 28, *and* 55 *Geo. III. c.* 184.

An inventory of the deceased's estate was recorded in the Sheriff-Court Books of on the day of 18 .
Scotch Register, No. 18 *Folio.*

AN ACCOUNT *of the Personal* † Estate of late of who died on the day of *One thousand eight hundred and* .

This Legacy became payable on the death of ‡ who died the , BETWEEN :—

Names of the Executors-Nominate or Dative, Trustees, or Heir-at-Law.	Their Residence.	and Profession.	State whether Executors-Nominate or Dative, Trustee, or Heir-at-Law.

Acting under trust-deed of settlement or will, executed by the deceased, or decree-dative by the Sheriff-Clerk of dated the day of *One thousand eight hundred and* , AND :—

Name of the Legatee or Next-of-Kin.	Degree of Relationship, if any, to be here stated as on the other side.	Describe the Nature of the Bequest, and if Residue, say what Part or Share.	Price of Stocks.	Value.	Rate of Duty per Cent.	Amount of Duty.
		Add Interest, Dividends, or other accumulations to this date. . . .	£			

§

† If a legacy be satisfied out of real estate, the word "real" must be substituted for "personal."

‡ If the legacy became payable on the death of any person other than the testator, please insert the particulars here.

§ In cases of legacies given in trust for infants, then state, in the space above,

Received,¶ the day of 18 the , being legacy or share of residue out of *personal* ‖ estate above mentioned, having first allowed or paid for the duty thereon.

Exam^d. Ent^d. No.

RECEIPT FOR DUTY.

INLAND REVENUE OFFICE, .—Received the day of 18 the sum of for duty on account of the personal estate within mentioned.

£ : :

Registered

Duty charged Comptrolled

Control Clerk. ℘ *Comptroller of Stamps and Taxes.*

PENALTIES.

The receipt must be dated on the day of signing, and the duty paid *within twenty-one days after*, under a penalty of £10 per cent. on the amount of the duty; and if the duty is not paid *within three months* from the date of the receipt, a penalty will be incurred of £10 per cent. *on the amount or value of the legacy*

All rents, interests, or dividends of legacies down to the date of the receipt must be added to the legacy and duty paid thereon.

This form is frequently signed by the executor only, as retaining the legacy, and therefore cannot, although stamped, be a sufficient discharge for the payment by him of anything but the duty.

"In trust for the said legatee, a minor;" or if given to be enjoyed by different persons in succession, all chargeable with the *same* rate of duty, or subjected to any contingency, or power of appointment, or bequeathed in any other special manner to or for more than one person, then state the particulars of such bequest.

¶ If the legacy be "retained in trust," substitute those words for the word "received."

On legacies given in succession to persons chargeable with *different* rates of duty, the persons entitled for life only are to pay duty as annuitants, and must therefore give their receipt in the form to be used for annuities, No. II.

In cases of residues, or shares of residues of personal estate, retained by executors or administrators, either to their own use, as residuary legatees, or next-of-kin, or as trustees for the use and benefit of others, and in cases of residues, or shares of residues of monies arising from real estate, retained by executors or trustees in like manner, a particular account must be given of the property, according to a printed form, No. III., provided for the purpose, and to be had at the Inland Revenue Office, or of the distributors of stamps.

‖ If a legacy be satisfied out of real estate, the word "real" must be substituted for "personal."

Where this is the case, he should, upon paying the legacy, get a receipt from the legatee, stamped with an ordinary receipt stamp. But if the legatee signs the above form of receipt before it has been stamped, no receipt stamp is required.(*g*)

305. Annuity Receipt.—The following is the form of receipt required at the stamp-office :—

FORM No. II.*—INLAND REVENUE, EDINBURGH.—*Receipt and Discharge for any Gift or Legacy by way of Annuity, payable out of Real or Personal Estate, to any Child, or Descendant of any Child, or to the Father or Mother, or any Lineal Ancestor, or to Collateral Relations or Strangers in Blood to the Deceased, pursuant to Acts* 36 *Geo. III. c.* 52, 45 *Geo. III. c.* 28, *and* 55 *Geo. III. c.* 184.

An inventory of the deceased's estate was recorded in the Commissary-Court Books of the day of 18

Note.—By Stat. 16 & 17 Vict. c. 51, § 31, the values of annuities, whether for life or years, are to be calculated by the tables annexed to that Act, and the duty chargeable thereon, to be paid by four equal instalments, out of the first four annual payments of the annuity.

Interest at the rate of four per centum per annum is payable, in all cases, from the time when each instalment falls due (31 & 32 Vict. c. 124, § 9).

Register *No.* 18 *Folio.*

AN ACCOUNT *of the Heritable* † Estate of late of , who died on the day of *One thousand eight hundred and* . This Annuity became payable on the death of ‡, who died the , BETWEEN :—

Names of the Executors-Nominate or Dative, Trustees, or Heir-at-Law.	Their Residence	and Profession.	State whether Executors Nominate or Dative, Disponees in Trust, or Heir-at-Law.

Acting under trust-deed of settlement or will executed by the deceased, or decree-dative by the Commissar of , dated the day of *One thousand eight hundred and* , AND :—

* This form is for property chargeable under the Legacy Duty Acts. A separate form is supplied for property chargeable under the Succession Duty Act.

† Or personal, if payable out of the moveable estate.

‡ If the annuity became payable on the death of any person other than the testator, please insert the particulars here.

(*g*) 36 Geo. III. c. 52, § 41.

Name of the Annuitant, with the Name and Age of the Life or Lives, or the Number of Years for which the Annuity is to endure.	Degree of Relationship, if any, to be here stated as on the other side.	Amount of the Annuity.	Age or Ages, or number of Years.	Value of the Annuity.	Rate of Duty per Cent.	Amount of Duty.
who was born on the day of 18 .		Instalment of Duty now paid.				
		Interest or Discount at the Rate of £4 per Centum per Annum from date when due to this date.				
Insert in this space when the Annuity commenced, and in what manner it is payable. The first Instalment of Duty is payable when the Annuitant shall have received a full year's Annuity.		Amount of the Year's Annuity Allowed the Payment of Duty Balance received, £				

Received § the day of 18 the in full of years' payment of my annuity, out of the heritable † estate above mentioned, due the day of 18 , having first allowed or paid the duty thereon.

RECEIPT FOR DUTY.

INLAND REVENUE OFFICE, .—Received the day of 18 , the sum of for duty on account of the annuity above mentioned.

£ : :

Registered

Duty charged *Control Clerk.*

Comptrolled ℙ *Comptroller of Stamps and Taxes.*

The value of an annuity falls to be computed from the tables annexed to the Succession Duty Act, 1853.(*h*) For example, if the annuity amounts to £100, and the annuitant is forty years of age, the value of the annuity is £1487, 10s., 1 per cent. upon which is £14, 17s. 10s., which is the duty chargeable. The duty

§ Or retained in trust.

† Or personal, if payable out of the moveable estate.

(*h*) 16 & 17 Vict. c. 51. See also § 272, *supra*.

is payable during the first four years by equal annual instalments from the commencement of the annuity, and a penalty will be incurred if any of the instalments be not regularly paid. Should the annuitant die before the four years have expired, the date of death must be communicated in writing to the Controller of Legacy Duties.(*i*)

306. Residuary Account.—The rendering of this account is sometimes attended with considerable trouble to agents ; but this we apprehend mainly arises from inattention to the instructions that have been issued by the Board of Inland Revenue, which are as follows :—

1. Executors and trustees, before retaining any part of the property to their own use, are to *deliver* the particulars thereof to the Commissioners of Inland Revenue, or to the stamp distributor in whose district they reside, and pay the duty thereon, within fourteen days after, under a penalty of treble the value of the duty.

2. *Two copies* must be rendered by executors of *each account of residue* of a deceased person's estate, lodged by them for the purpose of paying the duty.

3. All rents of heritable estates directed to be sold, and all dividends, interest, and profits arising from the personal estate of the deceased subsequent to the time of his or her death, and all accumulations thereof down to the time of the executor's or trustee's delivering the account, and offering to pay the duty on the residue, must be considered as *part of the deceased's personal estate*, and must be accounted for accordingly (under one or other of the foregoing heads), pursuant to a decision of the Court of Exchequer in Trinity Term, 1810, in the case of the Attorney-General *v.* Lord Geo. Hen. Cavendish.

4. *Effects* not consisting of money or securities for money are to be valued at the time the account is rendered, when inventories and proper valuations thereof will be required to be produced. The *stocks* are to be valued at the medium price of that day.

5. The values of *annuities* must be calculated by the tables annexed to the Act of 16 & 17 Vict. c. 51.

6. In cases attended with special circumstances, to which the official form of account may not be exactly suited, they may be introduced into the account, or stated in a separate paper and annexed.

7. Where the residue of the personal estate is given to one for life,

(*i*) 36 Geo. III. c. 52, § 8 ; 16 & 17 Vict. c. 51, § 31.

and afterwards to others, a *distinct* account must be given of the rents, dividends, and interests accrued subsequent to the death of the testator, and of the payments thereout for interest of legacies, and for interest of the testator's debts accrued after his decease, so that the balance due to the residuary legatee for life may appear, and the proper duty be charged thereon.

8. The distributor is to require evidence to be produced to him of the payments taken deduction for in the account, and to certify on account that such evidence has been so exhibited.

9. Even in cases where it appears to executors that no legacy duty is exigible from them, by reason of the deceased's personal estate having proved insufficient to discharge his personal debts, it is still requisite that they should render a residue account of the estate, and produce the corresponding vouchers, in order that it may be ascertained in how far they are entitled to exemption from duty on this score.

The following is the form of the residuary account issued by the Inland Revenue Office :—

FORM NO. III.—RESIDUARY ACCOUNT,* INLAND REVENUE.—*Form of Account of Personal Estate, and of Monies arising from the sale, charge, or other disposition of Heritable Estate directed by Will or Testamentary Deed to be sold, &c., for the purpose of having the legacy and residue duties charged and assessed pursuant to the Acts of* 36 *Geo. III. c.* 52, *and* 45 *Geo. III. c.* 28, *and* 55 *Geo. III. c.* 184.

DIRECTIONS.

1. Executors and trustees, before the retainer of any part of the property to their own use, are to deliver the particulars thereof at the Legacy Duty Office in Edinburgh, or to the distributor in whose district they reside, and pay the duty thereon within fourteen days after, under the penalty of treble the value of the duty.(*k*)

2. All rents, dividends, interest, and profits arising from the personal estate of the deceased, or from the heritable estate directed by will to

* This account should be delivered in duplicate either personally or by an agent at the head office in Edinburgh, or at a stamp-office in the country, and not sent by post.(*j*) This form is for property chargeable under the Legacy Duty Acts. A separate form is supplied for property chargeable under the Succession Duty Act.

(*j*) It is imperative that the account be delivered *in duplicate* in manner stated.

(*k*) The duty here falls to be paid upon the form of legacy receipt given above.

be sold, &c., subsequently to the time of the death, and all accumulations thereof down to the time of delivering the account and offering to pay the duty on the residue, must be considered as part of the estate, and be accounted for accordingly.(*l*)

3. In cases of insolvency, or when the shares of the residuary legatees shall not be of the value of £20 each, an account must nevertheless be rendered by the executors in the manner before directed, in order that the commissioners may satisfactorily ascertain that the estate is not chargeable with duty.

An inventory of the deceased's estate was recorded in the Sheriff-Court Books of the day of 18

Scotch Register, No. 18 *Folio* (*m*)

AN ACCOUNT of the Personal Estate, and of Monies arising out of the Real Estate of , who died † on the day of *One thousand eight hundred* exhibited by , the executor or trustee acting under the will or deed of settlement of the deceased, recorded in, or as executor-dative, nominated by the Sheriff of

State these particulars accurately, and strike out such parts as are not applicable to the case.

The duty on the property comprised in this account became payable on the death of , who died the

If the Duty became payable on the death of any person other than the Testator (or Intestate) please insert the particulars here.

[This account should include all the personal estate of the deceased, at home or abroad, and any property over which the deceased had a general power of appointment, and also the proceeds or value of any heritage or real property which the deceased directed to be sold, and also any heritage which the executors or trustees have sold, or intend to sell, under the power conferred by the testamentary deed; with all accumulations to the date of the account.(*n*)]

† State here whether the deceased died *testate* or *intestate*.

(*l*) The several items of accumulation are detailed in the end of the form.

(*m*) The particulars for filling these blanks are furnished by the letter which is usually sent by the Board to the executor.

(*n*) See §§ 153, 160.

[DESCRIPTION OF PROPERTY.

Money, and Property converted into Money, are to be inserted in Column No. 1, and the date when converted affixed.

NOTE.—If there should not be room in this Form for the particulars of any description of the Property, the total only of the Amount or Value of such Property is to be inserted here, and the particulars are to be stated on a separate paper. The shares unconverted are to be valued at the medium price of the day on which the Account is dated.(*q*)

DESCRIPTION OF PROPERTY.	Date of Sales, if Sold.(*o*)	No. 1. Money Received and Property Converted into Money. £	s.	d.	No. 2. Value of Property not Converted into Money. £	s.	d.
Cash in the house, . . .							
Cash at the banker's, . . .							
‡ Furniture, plate, linen, china, books, pictures, wearing apparel, jewels, and ornaments,(*r*)							
‡ Wine and other liquors, .							
‡ Horses and carriages, farming stock, and implements of husbandry,(*s*) . . .							
‡ Stock in trade, ...							
‡ Good-will, &c., of trade or business, ...							
Life Assurance policies, . .							
Rents and feu-duties falling under executry, . .							
Bonds, bills, notes, and interest due at the death, . .							
Book and other debts, . . .							
Bank shares,—viz., . . .							
Railway shares,—viz., . . .							
Other shares,—viz., . . .							
Carried forward, . .	£						

‡ Property not converted into money is to be valued at the time the account is rendered and inserted in Column No. 2, and inventories and proper valuations must be produced.(*p*)

(*o*) These particulars are necessary to admit of the figures being checked.

(*p*) This means the value at the date the account is signed. As regards stocks or shares quoted on the Stock Exchange, the value may be taken from the Stock Exchange list, the account in that case being dated to correspond with the date of the quotations. The value of other stocks or shares may be instructed by letters from the secretaries of the companies.

As regards heritable property directed to be sold, but not sold at the date of the account, it is not *positively* necessary to produce a valuation by a licensed appraiser. A detailed statement of the rent and deduction from it may suffice.

(*q*) This means the *average* price when the prices of the day vary.

(*r*) The appraisement of furniture need not be stamped.

(*s*) Where the deceased was a partner in a business, a balance sheet showing the proportion of his assets and liabilities must be produced.

DESCRIPTION OF PROPERTY.	Date of Sales, if Sold.	No. 1. Money Received and Property Converted into Money. £	s.	d.	No. 2. Value of Property not Converted into Money. £	s.	d.
Brought forward, .							
The stocks or other securities of British colonies, and any money invested in the colonies—viz., ...							
Ships, or shares of ships, . .							
Dividends on the above shares and stocks due at the death,							
Price of Stocks.							
Exchequer bills, . £							
Bank stock, . . £							
East India stock, £							
East India bonds, £							
3 per cents. consols, £							
3 per cents. reduced, £							
New 3 per cents, . £							
Dividends on the above stocks due at the death, . . .							
The stocks or public securities of Foreign States, and any money invested abroad—viz.,							
Property which the testator had power to appoint as he thought fit—viz., ...							
Property not comprised within the above description, viz., §							
Carried forward, . . . £							

NOTE.—If there should not be room in this Form for the particulars of any description of the Property, the total only of the Amount or Value of such Property is to be inserted here, and the particulars are to be stated on a separate paper. The stocks unconverted are to be valued at the medium price of the day on which the Account is dated.

§ Particulars should be given of any legacy, residue, or other property which has vested in the deceased, but which may not at present be available for division, in consequence of its being liferented by persons now living, or from any other cause.

DESCRIPTION OF PROPERTY.	Date of Sales, if Sold.	No. 1. Money Received and Property Converted into Money. £	s.	d.	No. 2. Value of Property not Converted into Money. £	s.	d.
Brought forward, . .							
¶ Heritable estate, including feu-duties, tacks and heritable bonds excluding executors, directed to be sold, as per statement of particulars annexed,(*t*)							
Carried forward . .	£						

¶ When directed by the will or deed of settlement to be sold or uplifted. Heritable estate, if not directed to be sold, is chargeable with succession duty.

(*t*) The statement may be in this form :—

I. PROPERTY ACTUALLY SOLD.

Description.	Tenure.	Date of Sale.	Sum Realised.
House and Premises, No. 100 Gladstone Hill, Edinburgh, occupied by A. B., . .	Burgage.	1st Oct. 1883.	£2000
Landed Estate called Tipton, County of Linlithgow, occupied by A. B., ...	Crown.	Do.	£10,000
House and Garden, Corstorphine, occupied by A. B., . .	Long Lease, expiring Mart. 1900.	Do.	£1000
			£13,000

And then there will be carried into the account the following :—

Burgage property sold as per statement, ... £2000 0 0

And so with the other items.

II. PROPERTY STILL UNSOLD.

House and Garden at Corstorphine called Tipton, occupied by A. B. at the yearly rent of, ... £50 0 0

Deduct—

Feu-duty, ...	£2	10	0
Repairs at 10 per cent., ...	5	0	0
Insurance, ...	0	10	0
			8 0 0
			£42 0 0
Worth 15 years' purchase, ...			15
Value, . . .			£630 0 0

DESCRIPTION OF PROPERTY.	Date of Sales, if sold.	No 1. Money Received and Property Converted into Money. £	s.	d.	No. 2. Value of Property not Converted into Money. £	s.	d.
Brought forward, . .							
State in a separate paper particulars of any heritage or other property not accounted for; and mention whether deceased had any interest, by way of liferent, annuity, or other charge, in property not comprised in this account. If no such property or right of liferent, a statement to that effect should be inserted here.							
(*Insert the Total of Column No.* 1 *in Column No.* 2), £							
Total of property, . . £							
PAYMENTS.		£	s.	d.			
Fees of the confirmation and inventory or stamp duty, ...							
Sickbed and funeral expenses, . .							
Expenses attending the executorship or administration, ...							
Debts on open account, rent and taxes, wages, &c., due at the death of the deceased, ...							
Debts on personal bond and other securities, ditto, ...							
‖ Pecuniary legacies already paid, per schedule annexed, . . .							
(*Deduct the Total of the payments from the Total of the property*), . . . £							
Nett amount of Property carried down, £							

To show the balance of cash, if any.(*u*)

Total of Column No. 1, . . £ : :
Total of payments, . . . £ : ;

Cash account, . £ : :

NOTE FOR THE DISTRIBUTOR OF STAMPS.—The Distributor to certify that legal evidence has been produced to him of these Payments; and a Schedule of these Deductions, signed by the Trustee or Executor is to be annexed.

‖ State when duty paid.

(*u*) The object of this balance is to enable the Board to charge interest from the time of the conversion of the various investments until the rendering of the account, if that event be long deferred.

No. 3.

Note.—Upon reversions falling in, state the date of the death of the liferenter.

Separate papers are to be annexed to the account to show how these totals are made up.

Nett amount of property brought forward, . £

ACCUMULATIONS OF INTEREST, DIVIDENDS, RENTS, &c.

Rents of heritable estate directed to be sold, to the time of sale, if sold; if not to the date of this account,

Dividends on the stocks and funds sold, to the time of sale; and of those remaining unsold, including the last dividends, ...

Profits of farm or business, to the date of this account, or whilst carried on, ...

Interest on bonds and other securities paid off, to the day of payment; and of those outstanding to the date of this account, ...

Interest at 4 per cent. on £ being the balance of cash in hand, as on the other side, to the date of this account, ...

Income of bank, canal, railway, and other shares, to the time of sale, and of those remaining unsold, and on other property yielding an income not included in any of the above items, to the date of this account,

The value of the benefit accruing to the executor or other person entitled to the residue, from the interest of money or dividends of stock retained to answer vested or contingent legacies, payable at a future day without the intermediate interest or dividends, .

Total, . . £

PAYMENTS OUT OF INTEREST, &c.(v)	£	s.	d.
Interest on bonds, and other securities, due from the estate, ...			
Interest on pecuniary legacies, . .			
Payments on account of annuities, . .			
Other payments, if any—viz., . .			

(*Deduct the total amount of these payments from the preceding total*), ... £

Balance, . £

(v) As all interests and monies due *to* the estate must be included in the account, so inversely all such due *from* it must be deducted.

DEDUCTIONS FROM RESIDUE.	£	s.	d.	£	s.	d.
Retained to pay debts still due from the estate,(*w*)						
Retained to pay outstanding legacies,(*x*) .						
Value of specific legacies, per schedule annexed, ...						
Total deductions, . £						
Nett Residue, . £						
Deduct any portion of the Residue not liable to duty, or for which duty is paid on separate receipts—viz.,(*y*)						
Residue on which duty is chargeable,(*z*) . . . £						

The Distributor to certify that evidence has been produced to him of the existence of these Debts; and a Schedule, signed by the Trustee or Executor, is to be annexed. A Schedule of Particulars of these Deductions to be annexed.

DECLARATION.(*a*)

do declare that the foregoing is a just and true account. And offer to pay the sum of £ for the duty, after the rate of £ per cent. upon the sum of £ being of the said residue and moneys to which entitled and intend to retain to own use, or for the use of being of the deceased.

Dated this day of 18 .

(*Here sign the account*)(*b*) .

State whether this Sum is the whole or what part of the Residue. Insert the Christian and Surnames of the Residuary Legatees or Next-of-Kin, and their Relationship or Consanguinity, in the words of the Act, as set forth in § 293 *supra*.

(*w*) Debts may be unpaid for various reasons: they may be disputed; the creditor may have recently died, and so forth.

(*x*) The legatee may be an infant, or be resident abroad, or have mortgaged his legacy to one and sold the remainder of his interest to another, or other circumstances may render it inexpedient to pay the legacy at the time. In such cases, the board insist on the duty on the legacies being paid before permitting them to be claimed as deductions from the estate.

(*y*) The widow's portion falls to be deducted. Where also legatees are in different degree of kin to the deceased, they must not all be inserted in the declaration, as the Board will not stamp one document with several rates of duty.

Where the executor is not one of the residuary legatees, it is preferable to transfer the whole of the residue to legacy receipts, and get the legatee's signature thereto. This will save a special receipt.

(*z*) The duty must be paid at the time the account is passed.

(*a*) The whole of the beneficiaries' names must be inserted in the declaration. Where any who acquired vested interests have died, the names of the representatives of such must be given. In such cases *two* duties may be payable.

(*b*) The executor must himself date and sign the account, or one executor may sign for himself and the others. The signature of an agent is not sufficient.

ASSESSMENT.

The duty on the within-mentioned sum of £ , at the rate of £ per cent., is assessed at £ .

By the Commissioners ,

Legacy Duty Department, Edinburgh, , 18 .

RECEIPT FOR DUTY.

INLAND REVENUE OFFICE, .—Received the day of 18 , the sum of for Duty.

£ : :

Registered ,

Duty charged , Comptrolled ,

Control Clerk. *Comptroller of Stamps and Taxes.*

307. Time for rendering the Residuary Account.—There is no time fixed within which the account requires to be rendered, but it should be rendered as soon as possible after the death, as duty is payable on the accumulation of the property, and interest is also chargeable at 4 per cent. on the balance of cash in the hands of the executor.

308. The rendering of the Account Compulsory.—Excepting in the case of a widow, where she is the sole residuary legatee, an account must be lodged in every case, even in cases of insolvency, or where the residuary legatees receive less than £20 each, in order that the Commissioners may satisfy themselves as to the liability of the estate to duty.

309. Accounts delivered in the Country.—Executors may render the account and pay the duty thereon to the stamp-distributor of the county or district in which they reside. Each distributor transmits the receipts and residuary accounts left with him to the head-office at stated times, and these are afterwards returned duly stamped and registered, to be redelivered to the persons to whom they belong.

II. THE SUCCESSION DUTY.

310. The Succession Duty Act.—This Act came into operation on 19th May, 1853(*c*), and it is retrospective in its operation as to the property chargeable with duty, and as to the mode of

(*c*) 16 & 17 Vict. c. 51, § 54.

taxing leasehold property.(*d*) There are also specially incorporated into it the provisions of the 36 Geo. III. c. 52 which relate (*e*)—

1. To the mode of paying duty on gifts by way of annuity.(*f*)
2. To money to be laid out in the purchase of an annuity.(*g*)
3. To legacies whose value can only be ascertained by application of the allotted fund.(*h*)
4. To legacies to be enjoyed by different persons in succession, or having partial interests therein.(*i*)
5. To the persons by whom the duty in such cases is to be paid.(*j*)
6. To the mode of charging duty on unproductive articles to be enjoyed in specie.(*k*)
7. To gifts satisfied otherwise than in money.(*l*)

311. Object of Act.—The object of the Act is to impose upon *real* property and personal property conveyed by deed other than a will accruing to any person by reason of death, the same liability to duty which the Legacy Duty Acts had previously imposed upon *personal property* derived under a *will or intestacy.*

312. What is "Real Property" within the Act.—The term real property includes all freehold, copyhold(*m*), customary, leasehold, and hereditaments, and *heritable property,* whether corporeal or incorporeal(*n*), in Great Britain and Ireland, except money secured on heritable property in Scotland, and all estates in any such hereditaments.(*o*)

Previous to the passing of the Succession Duty Act, leasehold property was subject to the operation of the Legacy Duty Acts, but the former Act expressly exempts such property from legacy duty, and makes it chargeable with succession duty in the same way as heritable estates.(*p*)

Formerly, money secured on heritable property in Scotland was considered heritable, but by an Act passed on 31st December, 1868(*q*), all heritable securities are made moveable property (whether they shall have been granted before or after that date),

(*d*) 16 & 17 Vict. c. 51, §§ 15, 19.
(*e*) *Ibid.* § 32.
(*f*) 36 Geo. III. c. 52, § 8.
(*g*) *Ibid.* § 10.
(*h*) *Ibid.* § 11.
(*i*) *Ibid.* § 12.
(*j*) *Ibid.* § 13.
(*k*) *Ibid.* § 14.
(*l*) *Ibid.* § 23.
(*m*) See definitions in § 209.
(*n*) See §§ 83, 235.
(*o*) 16 & 17 Vict. c. 51, § 1.
(*p*) *Ibid.* § 19.
(*q*) 31 & 32 Vict. c. 101, § 117.

so as to devolve to the personal representatives of the deceased owner, except where they are expressly conceived in favour of heirs *excluding executors.*

313. What is "Personal Property" within the Act.—The term personal property does not include leaseholds, but includes money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definitions of "real property."(*r*)

The term "money payable under any engagement" includes an annuity under a deed, also money secured by bond.(*s*)

Within the Act, the term property includes real and personal property.(*t*)

The liability to duty on personal property is governed by the domicile of the owner at the time of death. Consequently the whole personal property of a person dying domiciled within the United Kingdom is liable to duty, wherever such property may be actually situated at the time of death; and conversely, the personal property of a person dying domiciled out of the United Kingdom is not liable to duty, though the property be situated in this country at the time of his death.(*u*)

314. What the term "Succession" denotes.—This term denotes "any property chargeable with duty" under the Act(*v*)—*i.e.*, the actual property to which the successor is entitled, not the mere act of succeeding to it. This distinction between *property* and *succession* must be kept in view in reading the Act. The Act imposes a duty on a succession; so property, by passing *inter vivos*, may under it escape the duty altogether.(*w*)

A succession is created in the case of a disposition or will as soon as it takes effect, and in the case of intestacy, at the death of the intestate; and the liability of the successon to duty attaches immediately upon its being created, although the duty is not actually payable until the succession falls into possession.(*x*)

The property chargeable with duty under the Legacy Duty Acts is exempt from Succession Duty, consequently a legacy is not a succession.(*y*)

(*r*) 16 & 17 Vict. c. 51, § 1.
(*s*) Hanson, p. 227.
(*t*) 16 & 17 Vict. c. 51, § 1.
(*u*) Hanson, pp. 67, 219.
(*v*) 16 & 17 Vict. c. 51, § 1.
(*w*) Hanson, p. 228. But see § 15 of 16 & 17 Vict. c. 51, and § 38 of 44 Vict. c. 12.
(*x*) 16 & 17 Vict. c. 52, § 20.
(*y*) 16 & 17 Vict. c. 51, § 1.

315. What Dispositions and Devolutions of Property confer Succession.—The words of the Act are(*z*) :—

Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the 19th day of May, 1853, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the 19th day of May, 1853, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition, or devolution, a "succession": and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

This section of the Act, it will be seen, divides property into two classes—viz., that which is acquired by "*disposition*" and that which is acquired by "*devolution by law.*"

Under a *disposition* is included every interest acquired in property by means of any act, *inter vivos* or testamentary of the owner, and which interest is so limited as to accrue either in point of right or of possession upon a death taking place after 19th May, 1853.

Under a *devolution by law* is included every transmission by act of law of the interest of any owner dying after 19th May, 1853, to his real or personal representative.(*a*)

The part of the section which relates to devolutions by law is not retrospective, but the part which relates to successions by dispositions is so.

The term disposition, as here used, must be taken to signify every act or obligation other than by way of sale, whereby one person confers on another any beneficial interest in property or the income thereof. Cases of *bonâ fide* sale are expressly exempted from the operation of the Act(*b*), and so also, in certain cases, are "Bonds or Contracts for valuable consideration in money or money's worth."(*c*)

A person succeeding under an entail is held to derive his title

(*z*) 16 & 17 Vict. c. 51, § 2.
(*a*) Hanson, p. 228.
(*b*) 16 & 17 Vict. c. 57, § 7.
(*c*) *Ibid.* § 17.

by devolution from his immediate ancestor(*d*), except where called nominatim, when he is held to take by disposition from the maker of the entail.(*e*)

Under the Act successions are conferred in the following cases:—

1. By any person taking by survivorship any beneficial interest in any property held jointly. But there is no succession by survivorship as between husband and wife.(*f*)

2. By general powers of appointment when executed.(*g*)

3. By the extinction of any charge, estate, or interest determinable by the death of any person, or at any period ascertainable only by reference to death, such as terce, annuities, and other burdens; also the increase either of income or of capital at the ending of the burdens.(*h*)

4. By dispositions, not being *bonâ fide* sales, and not conferring an interest expectant on death on the person in whose favour the same is made, accompanied by the reservation of a benefit to the granter, &c.(*i*)

5. By dispositions to take effect at periods dependent on death, or made with an engagement, secret trust, or arrangement, or made for evading duty.(*j*)

But persons who on 19th May, 1853, were entitled to heritable property, subject to leases for life, are not liable to duty in the event of the leases determining in their lifetime(*k*); and a succession derived from more predecessors than one, the proportional interest not being distinguishable, shall be deemed to be derived equally from each predecessor, unless an agreement be made with the commissioners.(*l*)

316. Rates of Duty.—The following duties are levied in respect of every succession chargeable under the Act, according to the value thereof, viz.:—

Lineal issue or lineal ancestor of the predecessor, £1 per cent.(*m*)
Brothers and sisters of the predecessor, and their descendants, ... £3 do.

(*d*) *Lord Adv.* v. *Zetland*, 5th Dec. 1876, 4 R. 199, H. L. 12th Feb. 1878.
(*e*) *Lord Adv.* v. *Drummond*, 16th July, 1867, 40 Jur. 21.
(*f*) 16 & 17 Vict. c. 52, § 3.
(*g*) *Ibid.* § 4.
(*h*) *Ibid.* § 5.
(*i*) *Ibid.* § 7.
(*j*) *Ibid.* § 8.
(*k*) *Ibid.* § 6.
(*l*) *Ibid.* § 13.
(*m*) See § 324 as to exemption from the 1 per cent. duty.

Brothers and sisters of the father or mother of the predecessor, and their descendants, . .	£5 per cent.
Brothers and sisters of a grandfather or grandmother of the predecessor, and their descendants, ...	£6 do.
Any other person, ...	£10 do.

The husband or wife of the predecessor is not chargeable with duty, and a successor whose husband or wife is of nearer relationship to the predecessor, is chargeable with duty at the lower rate.

317. Mode of Calculating the Duty.—As already mentioned(*n*), the mode of calculating the legacy duty is regulated by the provisions of the 36 Geo. III. c. 52, which are by 45 Geo. III. c. 28(*o*), made applicable to legacies and shares of money arising out of heritable estate.

These provisions now apply for the most part to the duty imposed by the Succession Duty Act upon successions in *personal* property.(*p*)

Following the order of the summary of the rules already given with regard to legacy duty(*q*), the rules with regard to the calculation of the duties on successions may be stated as follows(*r*) :—

1. *Immediate Gifts of Capital.*—The value of the succession is to be calculated without regard to any contingency which might pass the property to some other person; but in the event of the same so passing from the successor by the happening of the contingency, any duty which may appear to have been overpaid is to be returned to him.(*s*) The duty is to be paid all at once.

2. *Gifts by way of Annuity.*—The duty is to be charged only on the value of the annuitant's interest, calculated according to the tables annexed to the Succession Duty Act, and payable at the times, in the manner and subject to the rules already stated under this heading.(*t*)

3. *Gifts to Several Persons in Succession.*—If the several persons succeeding to the personal property be all chargeable with the same rate of duty, the whole duty is payable at once for the whole property; but if they are liable to different rates, the duty

(*n*) § 291 *supra.*
(*o*) § 7 of Act.
(*p*) 16 & 17 Vict. c. 51, § 32.
(*q*) § 291 *supra.*
(*r*) Summarised from Hanson, pp. 25-30.
(*s*) 16 & 17 Vict. c. 52, § 36.
(*t*) 16 & 17 Vict. c. 51, § 32; § 291 *supra.*

is to be calculated and paid according to the value of the interest of each person in the way already stated.(*u*)

4. *Gifts in Joint-Tenancy.*—Duty is chargeable in proportion to the legatee's respective interest in the succession in manner already mentioned.(*v*) But the Succession Act(*w*) makes all joint tenants liable to duty in respect of any increase of benefit accruing to them by survivorship. Therefore legatees in joint-tenancy are now chargeable with duty in respect of any further interest which they acquire by the death of their co-legatees, as well in cases where the latter are originally chargeable with duty, as in those where they are exempt. In the case of a gift to husband and wife jointly, either in liferent or in fee, no duty becomes payable on the death of the one who dies first. But if the gift is such as to confer on them a succession in the first instance, duty must be paid on the value of an annuity for the longest of the two lives.(*x*)

5. *Property given subject to Powers of Appointment.*—The rules are the same as those already stated under the Legacy Acts(*y*), with this addition made by the Succession Duty Act(*z*), that property appointed in execution of any general power taking effect upon a death (including a power created by will) is liable to duty, as a succession derived by the donee of the power from the person by whom it was created, notwithstanding that there is no gift of any previous interest in the property subjected to the power.

6. *Money directed to be laid out in Land.*—The rules here are also the same as those previously stated under the Legacy Acts(*a*), with this addition made by the Succession Duty Act(*b*), that all personal property which is subject to any trust for investment in the purchase of heritable estate, is to be charged with succession duty, so far as it is not chargeable under the Legacy Duty Acts, either as heritable or personal property according to the circumstances. After the money has been actually laid out, the duty is the same as on heritable property.

7. *Successions in Personal Property.*—The duty is to be assessed and paid in the same manner as on legacies.(*c*)

(*u*) See § 291 *supra* under this heading; 16 & 17 Vict. c. 51, § 32.
(*v*) See § 291 under this heading.
(*w*) 16 & 17 Vict c. 51, § 3.
(*x*) Hanson, p. 254.
(*y*) § 291 *supra*.
(*z*) § 4 of Act.
(*a*) § 291.
(*b*) § 30 of Act.
(*c*) § 32 of Act.

8. *Successions in Heritable Property.*—The following distinctions obtain—

(1.) Where the Property yields an Annual Income. — The duty is charged upon the value of the successor's life-interest in the annual value of the property, calculated according to the tables annexed to the Succession Duty Act, and is payable by eight equal half-yearly instalments, commencing at the expiration of twelve months from his becoming entitled to the beneficial enjoyment; and the seven following instalments at half-yearly intervals of six months each from the day on which the first instalment shall have become due. The difference between a successor for life and one in fee-simple is, that if the former dies before all the instalments are due, the unpaid instalments cease to be payable, while in the case of a successor in fee-simple, they are a continuing charge on his interest.(*d*) A personal right to heritable property now vests in the successor by mere survivance.(*e*)

(2.) Where the Property is not productive of fixed Annual Value. —Such as: (1) *Growing Timber.* Upon timber, trees, and wood, not being coppice or underwood, the successor is chargeable with duty only where the sales for the year, after deducting all necessary outgoings, exceed £10(*f*); (2) *Advowson or Church Patronage.* The rule here was (patronage being now abolished) to pay duty only when the patronage was sold, on the purchase money(*g*); (3) *Property subject to Beneficial Leases.* Duty is chargeable upon the successor's interest in any fine or grassum, &c., which is received for the renewal of the lease or the grant of any reversionary lease of the same property(*h*); (4) *Manor, opened Mine, &c.* The yearly value of a manor, opened mine, or other heritable property of a fluctuating yearly income, is to be ascertained with reference to the average yearly clear value of preceding years, or to the amount of interest at the rate of 3 per cent., which the principal value of the property would be sufficient to produce.(*i*)

(*d*) 16 & 17 Vict. c. 51; § 21.
(*e*) 37 & 38 Vict. c. 94, § 9.
(*f*) *Ibid.* § 23.
(*g*) *Ibid.* § 24.
(*h*) *Ibid.* § 25.
(*i*) *Ibid.* § 26.

A succession which is subject to a trust for charitable or public purposes, or which devolves on a corporation, is in either case chargeable with duty upon the principal value; the only difference being that in the former case the duty is to be raised and paid at once, while in the latter case it is made payable by instalments.(*j*)

318. What Deductions are allowed in Valuing Successions.—In estimating the annual value of lands, houses and other property yielding or capable of yielding income not of a fluctuating nature, an allowance is to be made of all necessary outgoings, as repairs, poor-rates, road and county rates, and the like, payable by the proprietor, but not of income tax or agent's charges for collecting rents.(*k*) Where heritable property is let below full annual value, further duty is to be chargeable in respect of the increase of benefit accruing to the successor at the end of the lease(*l*), or for any fine or premium he may receive for a renewal.(*m*)

An allowance is to be made of all incumbrances *not* created by the successor himself, but only so far as regards heritable property, by reducing the annual value to the extent of the yearly interest payable on the debt.(*n*) An allowance is also to be made in the case of heritable property in respect of monies which the successor may previously to his possession have laid out in substantial repairs or permanent improvements.(*o*) So also in all cases in respect of property which the successor, upon taking his succession, may be bound to relinquish.(*p*)

But no allowance is to be made in the first instance for any contingent incumbrance whereby the successor's interest is liable to be burdened(*q*), or of any contingency upon the happening of which the property may pass to some other person(*r*); but when the incumbrance takes effect, or the contingency happens, the matter is to be readjusted, and the overpaid duty returned.(*s*)

319. Mode of Collecting the Duty.—The provisions bearing on this branch of our subject are contained in §§ 45-50 of the Succession Duty Act. The accountable persons are required, in the case of personal property at the time of first paying, retaining, or otherwise disposing of it to the successor, or any person in his

(*j*) 16 & 17 Vict. c. 51, §§ 16, 27. See § 322 *infra*.
(*k*) 16 & 17 Vict. c. 51, § 22. Hanson, p. 308.
(*l*) 16 & 17 Vict. c. 51, § 20.
(*m*) *Ibid.* § 25.
(*n*) *Ibid.* § 34.
(*o*) *Ibid.* § 34.
(*p*) *Ibid.* § 38.
(*q*) *Ibid.* § 35.
(*r*) *Ibid.* § 36.
(*s*) Hanson, p. 31.

right, and in the case of heritable property, at the time when the duty first becomes payable, to give notice to the Commissioners of their liability; and at the same time to deliver to the Commissioners a full and true account, duly verified by production of books and documents, of the property, and of its value, and of the deductions which they claim, together with the names of the successor and predecessor, and their relations to each other, and all other particulars necessary to enable them to ascertain the duties payable. If satisfied with such account the Commissioners may assess the duty on the footing of it, but if dissatisfied therewith, they may cause an account to be taken by a person to be appointed by themselves, and assess the duty on such account. In such case, however, the accountable persons may, upon giving notice in writing within twenty-one days after the date of the assessment, appeal to the Court of Exchequer(*t*), or where the duty does not exceed £50, to the Sheriff-Court. The proceedings of the court may be reviewed on appeal.(*u*) If, however, there is no appeal, and the duty assessed exceeds the duty assessable according to the account with which the Commissioners felt dissatisfied, the Commissioners may in their discretion charge the whole or any part of the expenses incident to the taking of the account for them as an increase of the duty; and if it is an appeal, the payment of expenses shall be in the discretion of the court.

If any accountable person makes default in delivering an account, the Commissioners may serve him with a summons with a view to enforce delivery of the account.

For any wilful neglect to give such notice of succession, or to deliver such account at the period prescribed, a penalty is inflicted at the rate of 10 per cent. on the duty payable on the succession, calculated at the rate of 1 per cent., and a like penalty for every month after the first month during which the neglect continues.

A similar penalty is inflicted upon a person neglecting to pay the duty within twenty-one days after its amount has been finally ascertained.

In practice, however, these penalties are never, except in very exceptional cases, exacted; instead, interest is charged on the unpaid duty under the provisions of the Act 31 & 32 Vict. c. 124.(*v*)

(*t*) The Court of Session constituted Court of Exchequer by 19 & 20 Vict. c. 56. See "Exchequer" in Barclay's "Digest."

(*u*) 19 & 20 Vict. c. 56, §§ 17, 20.

(*v*) § 9 of Act.

320. What Persons are accountable for the Duty.—Besides the successor, every person who, either in the character of trustee (which term includes an executor), guardian, tutor, or curator, or husband, may have the management of any property subject to succession duty, and also every person in whom such property is vested by alienation or other derivative title at the time it falls into possession, is personally accountable, and is a debtor to the Crown for the duty payable in respect of it, to the extent of the property he may actually receive or dispose of.(*w*)

The Act requires the court in which any case is pending for the administration of property chargeable with duty, to provide for payment of such duty out of any property in its possession or control.(*x*)

321. Where Duty is Payable.—All duties must be paid personally, either at the Inland Revenue Office in Edinburgh, or to a stamp-distributor in the country. At the same time the appropriate account must be presented for the purpose of being examined and stamped.

322. When Duty must be Paid.—Generally the time of payment of the duty is the time when the successor, or any person in his right, becomes entitled in possession to his succession, or to the receipt of the income and profits thereof(*y*), and not the time of the accruer of the right.(*z*)

Where the property chargeable with duty is subject to a prior charge or burden *not* created by the successor himself, the duty in respect of the increased value accruing upon the determination of such charge or burden is, if not previously paid, compounded(*a*) or commuted(*b*), to be paid at the time of such determination.

In the case of an annuity, or property made chargeable as an annuity, the duties chargeable thereon are to be paid by eight equal half-yearly instalments, the first to be paid twelve months after the successor becomes entitled to the beneficial enjoyment, and the seven following instalments at half-yearly intervals of six months each, from the day when the first instalment becomes due. If the successor die before all such instalments are due, the remaining payments shall cease, except the successor has the heritable property absolutely, and then all the instalments are to be paid.(*c*)

(*w*) 16 & 17 Vict. c. 51, § 44.
(*x*) *Ibid.* § 53.
(*y*) *Ibid.* § 20.
(*z*) Hanson, p. 24.
(*a*) See § 326 *infra.*
(*b*) See § 428 *infra.*
(*c*) § 21 of 16 & 17 Vict. c. 51.

The nterest of every successor in heritable property is considered as an annuity equal to the clear annual value thereof, and the duty is paid thereon as above, except in the following cases: (1) Property subject to a trust for any charitable or public purpose, the duty upon which is to be paid at once(*d*); (2) Timber, &c., which is not taxable until it is actually severed from the land, and then only upon sales exceeding £10 yearly; it is not to be taken into account in calculating the annual value of the succession(*e*); (3) An advowson or church patronage (now abolished) was chargeable on the purchase money as a legacy out of heritable estate within the meaning of the 45 Geo. III. c. 28, § 4(*f*); (4) Manors, casualty of superiority, opened mine and other heritable property of a fluctuating yearly income, the duty upon which is to be fixed with reference to the average profits of such preceding years as may be agreed upon, or otherwise upon the annual value calculated at 3 per cent. on the principal value of the property(*g*); and (5) successions taken by corporations, the duty on which is payable by instalments, as in the case of a successor in fee-simple.(*h*)

In the case of successions in personal property, the duty is to be paid in the same manner as if the successions were legacies bequeathed by the predecessor to the successor.(*i*)

In the case of a reversionary interest in personal estate bequeathed or devolving so as to become chargeable with legacy duty, no duty is payable until the property falls into possession, unless by sale or by arrangement with the liferenter, or otherwise, the value of it is sooner realised, so as to be given to the person entitled, in which case the duty is payable at once on the amount received. Where the title to any reversionary property, chargeable with duty, is accelerated by the surrender or extinction of the prior interests, the duty, unless previously commuted(*j*), is payable as if no such acceleration had taken place.(*k*)

Where a succession before falling into possession passes by reason of death to some other successor, one duty only is payable, but it is at the highest rate which would have been payable if each successor has been subject to duty.(*l*)

(*d*) 16 & 17 Vict. c. 51, § 16.
(*e*) *Ibid.* § 23.
(*f*) *Ibid.* § 24.
(*g*) *Ibid.* § 26.
(*h*) *Ibid.* § 27.
(*i*) § 32 of 16 & 17 Vict. c. 51.
(*j*) See § 299 *supra.*
(*k*) 16 & 17 Vict. c. 51, § 15.
(*l*) *Ibid.* § 14.

323. Interest on Arrears of Duty.—No provision is made in the Act with regard to the payment of interest upon arrears of duty, but the Act 31 & 32 Vict. c. 124(*m*), provides for the payment of such interest at the rate of 4 per cent., and enables the commissioners to enforce the payment.

324. Exemptions from Duty.—In the following cases no duty is imposed by the Succession Duty Act(*n*):—

1. On any succession or successions derived from the same predecessor under £100 in money or value.
2. On any succession estimated to be of less value than £20 in the whole.
3. On any moneys set apart in trust for payment of the duty on any succession.
4. On any interest surrendered or extinguished before 19th May, 1853.
5. On legacies and shares of personal estate already charged with duty under the Legacy Duty Acts.(*o*)

The Act 44 Vict. c. 12(*p*), exempts from the 1 per cent. legacy and succession duty, any personal property in respect of which stamp duty has been paid on the affidavit or inventory where recorded after 1st June, 1881. This does not apply to heritable property chargeable with duty.

325. Return of Duty.—Whenever any duty shall have been paid on account of any succession, and it shall afterwards be found that the same was paid by mistake, or in respect of property the successor was unable to recover, or from which he has been evicted or deprived, or otherwise, the commissioners shall refund the same.(*q*)

326. Duty may be Compounded.—In cases of hardship and inequality the Commissioners are authorised to compound the duty payable upon such terms as they think fit, and in special cases they may enlarge the time for payment of any duty.(*r*)

327. Duty may be Paid in Advance.—The Commissioners may receive any duty tendered to them in advance, and allow discount thereon at the rate of 4 per cent.(*s*) If after the duty has been paid it should appear that overpayment has been made, an application may be made for return of the overpayment.(*t*)

(*m*) § 9.
(*n*) 16 & 17 Vict. c. 51, § 18.
(*o*) See exemptions under Legacy Acts, § 300.
(*p*) § 41. See also § 293 *supra*.
(*q*) 16 & 17 Vict. c. 51, § 37.
(*r*) *Ibid.* § 39.
(*s*) *Ibid.* § 40. See tables showing how discount calculated, p. 484.
(*t*) *Ibid.* § 37.

328. Duty may be Commuted.—The Commissioners have power by the Succession Act to commute the duty presumptively payable in respect of a succession; but the power is seldom exercised except in cases where, for instance, the property comprised in the succession is being sold, or divided, or given up at once to the expectant successor by the person entitled to the previous interest.(*u*) By the 43 Vict. c. 14(*v*), the powers of the Commissioners have been extended to include the commutation of legacy as well as succession duty presumptively payable on reversionary and contingent claims.

329. Duty to be a First Charge on Property.—The duty is a first charge on the interest of the successor in heritable property and of all persons claiming in his right, but in the case of personal property, the charge lasts only so long as it remains in the ownership of himself or of a trustee for him.(*w*) Purchasers of heritable property are therefore liable for the duty when it has not been previously paid.(*x*) But *bona fide* purchasers for value and without notice are exonerated if a receipt is produced for the whole duty, notwithstanding any invalidity in the succession account or insufficiency in the assessment; and no such purchaser is to be subject to any duty, the liability to which depends upon intrinsic circumstances not appearing on the face of the title under which he purchased.(*y*)

In order to obviate any inconvenience resulting from these provisions, the Commissioners are empowered to make separate assessments of the duty, or to apportion it where it is already assessed, so as to render each part of the property chargeable only with the duty payable in respect of it.(*z*)

The Commissioners are required to deliver to any person interested in any property affected by duty, a stamped certificate of its payment.(*a*)

330. Official Forms.—The forms of accounts prescribed by the Board of Inland Revenue in relation to succession duties, consist of four, and are numbered 4, 5, 6, 7 respectively; the three preceding numbers, 1, 2, 3, relating to legacy duty, have been already noticed.(*b*)

(*u*) 16 & 17 Vict. c. 51, § 41.
(*v*) § 11.
(*w*) 16 & 17 Vict. c. 51, § 42.
(*x*) Nisbet, 8 D. 69.
(*y*) 16 & 17 Vict. c. 51, § 52.
(*z*) *Ibid.* § 43.
(*a*) *Ibid.* § 51.
(*b*) §§ 304, 305, 306

Form No. IV.

This form applies to property which comes under a deed of any kind, other than a will, and generally embraces personal property only, but it may also have reference to heritable or leasehold property if it be directed to be sold, but not otherwise. It is in the following terms:—

FORM No. IV. ABSOLUTE.—INLAND REVENUE.—*Succession Duty for Property not chargeable by way of Annuity.**

Register of the year 18 . *Folio* .

AN ACCOUNT of the Succession to Personal Property† of of upon the death of who died on the day of 18 , derived from the Predecessor under ‡ delivered by §

DESCRIPTION OF PROPERTY.		VALUE.		
	Price of Stocks, &c.	£	*s.*	*d.*
3 per cents. consols, £ .				
3 per cents. reduced, £ .				
New 3¼ per cents., £ .				
[If this space be not sufficient for all the property comprised in the succession a schedule should be annexed, and the totals inserted in this account.]				
Interest, dividends, &c., which have accrued from the date of the death to the date when duty tendered, ...				
Total, £				

declare, That this is a just and true account of all the personal

* This form is for property chargeable under the Succession Duty Act, and should be delivered *in duplicate*. A separate form is supplied for property chargeable under the Legacy Duty Acts.

† Personal property includes money charged on real property and money to arise from the sale of real property.

‡ Here state the title, whether under settlement, by survivorship, or in any other manner, and if under a deed or document, the date thereof, and the names of the parties thereto.

§ Here state whether trustee, &c., or successor.

property to which was entitled to succeed beneficially upon the death of the before-named and that the said is a of the predecessor, from whom the said property is derived.

Dated this day of 18 .

(*Here sign the account*)

ASSESSMENT.

The duty on the said sum of £ at the rate of £ per cent. is assessed at £ .

By the Commissioners .

Legacy Duty Department, Edinburgh, 18 .

RECEIPT FOR DUTY.

INLAND REVENUE OFFICE, .—Received the day of 18 , the sum of for duty on account of this succession.

£ : :

Registered .

Duty Charged Comptrolled

Control Clerk. *Comptroller of Stamps and Taxes.*

Where a succession accrues under a deed, the deed, or an extract, or a certified copy of it must be lodged with the Board for perusal at the time the account is lodged with them.

All dividends accruing from the date of death must be included in the account, as also all rents derived from property to date of sale and interest on prices received from date of sale to date of account.

The description of the successor must be given in the terms of the statute as given above under "Rates of Duty."(*c*)

Form No. V.

This form applies to personal property, the interest of which is given by a deed other than a will (No. II. Form should be used for bequests under a will) to some person for life, and after the decease of the liferenter the principal directed to be paid to other parties. It is in the following terms:—

FORM NO. V. ANNUITY.—INLAND REVENUE.—*Succession Duty for Life Interest in Personal Property.**

(*This Account to be delivered in Duplicate.*)

Register of the year 18 . *Folio* .

* This form is for property chargeable under the Succession Duty Act. A separate form is supplied for property chargeable under the Legacy Duty Acts.

(*c*) § 293.

AN ACCOUNT of the Succession of of upon the death of , who died on the day of , 18 , derived from the Predecessor under† delivered by‡

DESCRIPTION OF PROPERTY.	ANNUAL VALUE.		
	£	s.	d.
[If this space be not sufficient for all the property comprised in the succession, a schedule should be annexed, and the totals inserted in this account.]			

declare, That this is a just and true account of all the property, not being real estate or leasehold, to which was entitled to succeed beneficially for life upon the death of the before-named , and that the said was born on the day of 18 , and is a of the predecessor, from whom the said property is derived.

(*Here sign the account*)

ASSESSMENT.

No. . Year 18 .

The value of an annuity of £ for a life aged is £ ; and the duty on this sum at the rate of per cent. is assessed at £ .

By the Commissioners .

RECEIPT FOR DUTY.

INLAND REVENUE OFFICE, .—Received the day of 18 , the sum of being the instalment of the duty above mentioned.

£ : :

Registered,

Duty Charged *Control Clerk.*

Comptrolled, *Comptroller of Stamps and Taxes.*

N.B.—Interest at the rate of four pounds per centum per annum is payable in all cases, from the time when each instalment falls due. 31 & 32 Vict. c. 124, § 9.

† Here state the title, whether under settlement, by survivorship, or in any other manner, and if under a deed or document, the date thereof, and the names of the parties thereto.

‡ Here state whether trustee, &c., or successor.

On the death of the liferenter, the fee or capital sum liferented must be accounted for on Form No. IV.

Form No. VI.

This Form—the principal of the Succession Duty Forms—applies to heritable or leasehold property, whether conveyed or bequeathed by will, given by deed, or passing under intestacy. It is in the following terms :—

FORM No. VI.—INLAND REVENUE.—*Succession Duty on real property, which includes all Heritages and all Estates in any heritage, whether held in Fee-simple, or under Entail, or in Liferent, or on Lease.**

Register *of the year* 18 . *Folio* .

AN ACCOUNT of the Succession in Real Property of of in the County of upon the death of late of † who died on the day of 18 , derived from the Predecessor under ‡ delivered by § of .

DESCRIPTION OF PROPERTY.	Saleable Value. £	s.	d.	Gross Rack-Rental or Annual Value. £	s.	d.
[It should be stated whether the property is let on lease, and whether at rack-rent or at a ground-rent, or in consideration of a premium (in which last two cases further duty will be payable on the determination of the lease).]						
Total, . £						

If the space be not sufficient for all the Property comprised in the Succession, a Schedule should be annexed, and the Totals inserted in this Account.

* This form is for property chargeable under the Succession Duty Act, and should be delivered in duplicate, either personally or by an agent at the head-office in Edinburgh, or at a stamp-office in the country, *and not sent by post.* A separate form is supplied for property chargeable under the Legacy Duty Acts.

† State when inventory of deceased's personal estate was recorded. If no inventory yet recorded, explain the circumstances.

‡ Here state the title, whether under settlement, will, intestacy, or by descent' and if under any deed or other document, the date thereof and the names of the parties thereto.

Here state whether trustee, &c., or successor.

Deductions.	Capital. £	s.	d.	Annual Payments. £	s.	d.
Necessary outgoings (in case the same are payable *by the Owner* and *not by the Tenant*), viz. :—						
Feu-duty or Ground-annual, . .						
Land Tax Unredeemed, . . .						
Fire Insurance, ...						
Repairs, ...						
Annuities (if any) to which the property is subject, ...						
Interest of incumbrances, . . .						
[A schedule, containing short particulars of each incumbrance, and the names of the persons by whom it was created, should be annexed.]						
Note.—No deduction can be made for contingent incumbrances, or for any incumbrance created by the Successor, or for the expense of collecting rents or for income or property tax, or for any costs incurred in litigating the title to the property.						
Total, . £						

If the space be not sufficient for all the Deductions claimed, a Schedule should be annexed, and the totals inserted in this Account.

Total gross annual value, . £			
Total annual value of deductions, £			
Nett annual value, . . £			

declare, That this is a just and true account of all the succession in real and leasehold property of upon the death of the before-named and that the said was born on the day of 18 , and is a of the predecessor from whom the said property is derived.

Dated this day of , 18 .

(*Here sign the account*) .

Assessment.

No. . Year 18 .

The value of an annuity of £ for a life aged is £ ; and the duty on this sum, at the rate of per cent., is assessed at £ .

Instalments, . £ : :
Interest, . . . : : *By the Commissioners,*
Discount, . . . : :

Amount now payable, . £ : : *Legacy Duty Department, Edinburgh,* , 188

Registered . Duty charged , Comptrolled ,
Control Clerk. *Comptroller of Stamps & Taxes.*

RECEIPT FOR DUTY.

INLAND REVENUE OFFICE, .—Received the day of 18 , the sum of ; as per foregoing assessment.
£ : :

The following observations may be of use in filling up this form:—

Description of the Property.—The subjoined may serve as illustrations of how property may be described:—

Dwelling-house and Garden, No. 10 Athole Terrace, Edinburgh, let by the year to A. B., at a rent of . £50 0 0
Held in feu for 10s. per annum;

or,

Farm of Joppa in the County of Edinburgh, containing about 100 acres, lately in the occupation of the predecessor but now in that of the successor, . £100 0 0
Held of the Crown for a White Rose at Christmas yearly.
Assessed for property tax at £100;

or,

Freestone Quarry, let on lease for 10 years from Whitsunday, 1878, at the yearly fixed rent of £50, with optional royalty to the landlord of 1s. per ton of stone removed from the quarry.
The receipts from date of lease to 1st May, 1884, have been as follows:—

For year ended Whitsunday, 1879,	£20	0	0	
Do. do. 1880,	15	0	0	
Do. do. 1881,	25	0	0	
Do. do. 1882,	30	0	0	
Do. do. 1883,	40	0	0	
Do. do. 1884,	50	0	0	
One-sixth of	£180	0	0	
gives a yearly average of				£30 0 0

or,

House and Garden, No. 2 Athole Street, Edinburgh, let in lease to A. B. for 10 years from Whitsunday, 1884, at the rent of	£50	0	0
Held on long lease for 99 years, of which 70 were unexpired at Whitsunday, 1884. Tack duty 1s. a-year.			
Worth 8 years' purchase of the nett rental of £40, .	£320	0	0
or,			
Cessor (*i.e.*, extinction) of an annuity of £50 on the death of the said A. B. Such annuity is deducted in the Succession Account of W. O., dated 1st August, 1884, ...	£50	0	0

In the case of leasehold property, it is absolutely necessary to show the value, and it should also be shown how that value has been arrived at.

Properties of different tenures should be put on separate forms, as the mode of calculating the duty in each case is different.

Where a property is divisible between several successors of various ages, a separate account should be made up for each ; the first account showing the whole property, and the others the share each successor takes. In this way, assuming four successors, eight accounts would be required, as each account must be rendered in duplicate. Where, however, the property is small and the successors numerous, the Board of Inland Revenue may take one account in duplicate, if accompanied by a statement of the full names and respective ages of the successors, with a request that the duty be assessed in one sum on the average age of the lives of the whole of the successors mentioned in the statement. When this course is followed, a corresponding alteration will fall to be made on the declaration at the end of the account.

Outgoings.—These have been already noticed under § 318.

Repairs.—These are usually stated at 10 per cent. in cases of house property.

Annuities.—Where these are chargeable on heritable property liable to succession duty, the whole amount of such annuities may be deducted, but as each annuity falls in, the successor must pay further duty in proportion to the increased benefit which accrues.

Incumbrances.—As a rule, interest at 4 per cent. may be deducted on all incumbrances ; but where the interest payable is actually higher, the higher interest may be deducted. An incumbrance may be stated thus :—

A bond for £500 in favour of A. B., created by the predecessor in the year 1880, and still a charge upon the property, ... £20 0 0

Form No. VII.

This form is used for the payment of all instalments of duty after the first, or after the first and other instalments paid on Form No. VI. It is in these terms:—

FORM NO. VII. ANNUITY.—INLAND REVENUE.—*Second and Subsequent Instalments of Succession Duty on Real Property.**

Register of the year 18 . *Folio*

THE SUCCESSION of of upon the death of , who died on the day of 18 , derived from , the Predecessor under† for which Duty was assessed on the day of 18 , on an annual value of £ as shown by an account delivered by ‡ .

The value for a life of years is £ , and the amount of duty as assessed at £ per cent.	£	
The instalment (being an eighth part thereof) now due on £	£	

RECEIPT FOR DUTY.

INLAND REVENUE OFFICE, .—Received the day of 18 , the sum of being the instalment of the duty above mentioned.

£ : :

Registered Comptrolled

℣ *Comptroller of Stamps and Taxes.*

* This form is for property chargeable under the Succession Duty Act. A separate form is supplied for property chargeable under the Legacy Duty Acts.

† Here state the title, whether under settlement by survivorship, or in any other manner, and if under a deed or document, the date thereof, and the names of the parties thereto.

‡ Here state whether trustee, &c., or successor.

STATUTES.

(ANNOTATED.)

I.—*ACT* 1617, *c.* 14 : *Anent Executors.*(*a*)

Our Soveraigne Lord, understanding that a great number of ignorant people, the time of their sicknesse and disease, or otherwise at the making of their testaments and latter wills, do nominate certain strangers to be their executors, meaning only to commit the care of their goods and diligent ingetting thereof to the saids strangers, and that to the behoof of their children, or other persons who are nearest-of-kin: Whereas, by the contrary, the said office of executry, by the interpretation now observed, doth carry with it the whole profit and commoditie of the defunct's part of the goods contained in testament; which His Majesty findes to be altogether against law, conscience, and equity: Therefore His Majesty, with advice and consent of the Estates of Parliament, finds and declares that all executors already nominate in any testament not as yet confirmed, or to be nominate in any testament to be made hereafter, are, and shall be obliged to make count, reckoning, and payment of the whole goods and geare appertaining to the defunct, and intrometted with by them, to the wife, children, and nearest-of-kin, according to the division observed by the laws of this realm; reserving onely to the said executors the third of the defunct's part(*b*), all debts being first paid and deduced, without prejudice alwayes to the saids executors of whatsoever legacies left to them by the saids defuncts, which shall no wayes be prejudged by this present Act: But the said executors shall have full right to their saids legacies, albeit the same exceed the said third of the defunct's part, and, in case the saids legacies exceed the

(*a*) See the two prior Scotch Acts relating to the distribution of personal estate, printed on page 12 *supra*.

(*b*) This provision of the Act was held not to be in desuetude in the year 1852, in the case *Grant* v. *Murray*, 28th June, 1852, 24 Jur. 561 (H. of L.); but in 1855 the executor's claim was repealed by the 18 Vict. c. 23, § 8 *infra*.

whole third part, the saids executors shall have right to the whole legacie, and no part of the third; with this express declaration, That where legacies are left to the executors, they shall not fall both the saids legacies and a third by this present Act, but the saids legacies shall be imputed and allowed to them in part of payment of their third.

II.—*ACT* 1661, *c.* 24 : *Act concerning Appearand Heirs*(*c*), *their Payment of their Predecessor's and their own Debts.*

Our Soveraign Lord, with advice and consent of the Estates of Parliament, taking into consideration that appearand heirs, immediately after their predecessor's death, do frequently dispone their estate, in whole or in part, in prejudice of their predecessor's lawful creditors, before their death come to their knowledge, or before they can do lawful diligence against the saids appearand heirs; and which dispositions the saids appearand heirs do often make before they be served heirs(*d*), and infeft, or otherwayes, by collusion they suffer their predecessor's estates to be comprised or adjudged from them for payment of their own proper debts, real or simulate, without respect to their predecessor's creditors; and His Majesty, considering how just it is that every man's own estate should be first liable to his own debt before the debts contracted by the appearand heirs: Therefore His Majesty, with consent forsaid, declares, That the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming as to the defunct's estate: Providing always that the defunct's creditors do diligence against the appearand heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death. And because it were most unreasonable that the appearand heir, when he is served and retoured heir and infeft respective, should, for the full space of three years(*e*), be bound up from making rights and alienations of his predecessor's estate; and yet, it being as unreasonable that he should dispone thereupon immediately or shortly after his predecessor's death, in prejudice of

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(*c*) The person who occupies the position of nearest heir when a succession opens by death is called an apparent heir.—Ersk. 3, 8, 54. See also § 242 *supra*.

(*d*) A personal right to heritable estate now vests in the heir without service.—37 & 38 Vict. c. 94, § 9 *infra*.

(*e*) See Professor Bell's observations on this branch of the Act in 1 Com. 664; also M'Laren, §§ 2269-2272.

his predecessor's creditors, he having year and day(*f*) to advise whether he will enter heir or not: Therefore it is hereby declared, That no right or disposition made by the said appearand heir, in so far as may prejudge his predecessor's creditors, shall be valid unless it be made and granted a full year after the defunct's death.(*g*)

III.—*ACT* 1672, *c.* 13, *titled: Act for the Ann due to the Executors of Bishops and Ministers.*(*h*)—[*Edinburgh, 23rd of August,* 1672.]

The King's Majesty, judging it necessary for the good of the Church that such a stared and equal course be taken for clearing and securing the ann due to the executors of deceast bishops, beneficed persons, and stipendiary ministers as may be suitable to the interest of the executors, and no discouragement or hindrance to the planting of the vacand benefices: Doth therefore, with advice and consent of his Estates of Parliament, statute and ordain, That, in all cases hereafter, the ann shall be an half-year's rent of the benefice or stipend over and above what is due to the defunct for his incumbency, which is now settled to be thus—viz., if the incumbent survive Whitsunday, there shall belong to them for their incumbency the half of that year's stipend or benefice, and for the ann the other half; and if the incumbent survive Michaelmas, he shall have right to that whole year's rent for his incumbency, and for his ann shall have half-year's rent of the following year; and that the executors shall have right hereto without necessity or expenses of confirmation.

IV.—*ACT* 1681, *c.* 10: *Act concerning Wives' Terces.*(*i*)

Our Soveraigne Lord, considering that sometimes through the ignorance and inadvertencie of some writters and nottars clauses are insert in contracts of marriage containing provisions by husbands in favours of their wives, without mentioning the terce that is due to

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(*f*) The term of deliberation was cut down to six months by 21 & 22 Vict. c. 76, § 27.

(*g*) As to the rights and responsibilities of apparent heirs see §§ 267-270 *supra.*

(*h*) See observations on the history of this Act by the Lord President (Inglis) in *Latta,* 30th Nov. 1877, 5 R. 266. It was held in this case that this Act was not affected by the Apportionment Act of 1870 *infra.*

(*i*) See §§ 261-263 *supra.*

her by law, or expressing the provision to be granted in satisfaction of the terce, whereby occasion is given to relicts to claime a terce out of their husband's estates by and attour the provision conceived in their favours, contrary to the meaning and intention of the parties' contracters: For remeed whereof, the King's Majesty, with advice and consent of the Estates of Parliament, statutes and ordains, That, in time coming, where there shall be a particular provision granted by an husband in favours of his wife, either in a contract of marriage or some other writ, before or after the marriage, that the wife shall be thereby secluded from a terce out of any lands or annual rents belonging to her husband, unless it be expressly provided in the contract of marriage or other writ containing the said provision, that the wife shall have right to a terce by and attour the particular provision conceived in her favours(*k*): But prejudice alwayes to the Lords of Session to determine as to contracts of marriage, or provisions already made, according to the former law and custom.

V.—*ACT* 1690, *c.* 26: *Act anent the Confirmation of Testaments.*(*l*)

Our Soveraign Lord and Lady, the King and Queen's Majesties, and three Estates of Parliament, considering the great vexation occasioned to their Majesties' leidges by commissars and their clerks, fiscals and officers, charging them to confirm the testaments of their deceast relations: Do hereby discharge and forbid in all time coming all commissars and their fiscals, clerks, and officers, to charge, pursue, or require any person to confirm the testament, or give up inventary of the goods of any other persons defunct, except at the instance of the relict, bairns, nearest-of-kin, and their tutors and curators, or of a creditor(*m*); declaring all charges, pursuits, and executions other-

(*k*) It has been held that the wife's acceptance of a conventional provision is necessary to an effectual exclusion of the terce. Where she did not accept a provision during marriage, she was found entitled to elect between the provision and the terce at the husband's death.—*Cowan* v. *Kerr*, 15th Dec. 1830, 9 S. 188.

(*l*) The forms of obtaining confirmation are now regulated by 21 & 22 Vict. c. 58, and 22 Vict. c. 30 *infra*.—See also §§ 188-199 *supra*.

(*m*) In the practice of the ancient ecclesiastical courts an inventory of the whole personal estate had to be given up on oath, and, in case of failure, the next-of-kin or others entitled to the office of executor were charged to confirm at the instance of the procurator-fiscal of the Court. The reason of this was, that until such an inventory was given up, the "quots" of the clergy, or their shares of the succession, were not effectually secured. By the Act 1695, c. 41 *infra*, creditors may either obtain confirmation themselves or request the fiscal to confirm.

ways made and given to be void and null: And further, their Majesties, with consent foresaid, declare, That where special assignations and dispositions are lawfully made by the defunct, tho' neither intimat or made publick in his lifetime, they shall be yet good and valid rights and titles to possess, bruik, enjoy, pursue, or defend, albeit the sums of money, or goods therein contained be not confirmed; without prejudice always to the competition of creditors and others, and of their rights and diligences as formerly, before the making hereof.(*n*)

VI.—*ACT* 1695, *c.* 41: *Act anent Executry and Moveables.*

Our Soveraign Lord, considering that the law is defective as to the affecting with legal diligence the moveable estate which pertained to a defunct, either for his own or his nearest-of-kin's debt, in such manner as a defunct's heritage may be affected by charging to enter heir in the known manner: Doth therefore, with advice and consent of the Estates of Parliament, statute and ordain, That in the case of a moveable estate left by a defunct, and falling to his nearest-of-kin, who lyes out and doth not confirm, the creditors of the nearest-of-kin may either require the procurator-fiscal to confirm and assign to them, under the peril and pain of his being lyable for the debt if he refuse, or they may obtain themselves decerned executors-dative to the defunct, as if they were creditors to him (*o*); with this provision always, that the creditors of the defunct doing diligence to affect the said moveable estate, within year and day of their debitor's decease, shall always be preferred to the diligence of the said nearest-of-kin: And it is further declared, That, in the case of any depending cause or claim against a defunct the time of his decease, it shall be leisum to the pursuer of the said cause or claim to charge the defunct's nearest-of-kin to confirm executor to him within twenty days after the charge given; which charge so execute shall be a passive title

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(*n*) The provision with respect to special assignations is expressly reserved by 4 Geo. IV. c. 98, § 3 *infra*.

(*o*) As to the procedure under this Act see *Greig* v. *Christie*, 1st March, 1837, 15 S. 697. Where the debt is not constituted by writing or decree, the creditor must proceed to constitute it under the provisions of this Act.

Where the next-of-kin neither confirmed as executor nor renounced the succession, they were sued as vitious intromitters, and decerned against *cognitionis causa tantum*. —*Davidson* v. *Clark*, 13th Dec. 1867, 6 Macph. 151. If the pursuer insists in the action against the heir personally, it would seem that he must go through the preliminary of giving a charge, otherwise the heir will be entitled to absolvitor.—*Forrest* v. *Forrest*, 26th May, 1863, 1 Macph. 806.

against the person charged, as if he were a vitious intrometter, unless he renounce, and then the charger may proceed to have his debt constitute, and the *hæreditas jacens* of moveables declared lyable by a decreet *cognitionis causa*, upon the obtaining whereof he may be decerned executor-dative to the defunct, and so affect his moveables in the common form.(*p*)

VII.—*ACT* 1696, *c.* 20 : *Act anent Vitious Intrometters.*

Our Soveraign Lord, considering that many times the nearest-of-kin and others doth intromet with the moveables of persons deceast, without confirmation(*q*), and imbazles the saids moveables, in defraud of lawful creditors; and when they come to be pursued at the instance of any of the creditors for being lyable to the defunct's debt, as vitious intrometters, they ordinarly defend themselves with this pretence, that there is an executor-creditor confirmed before the intenting of the action; whereas a third party confirming executor-creditor in a particular subject, ought not to free the intrometter from the passive title of vitious intromission, when the intrometter has no right from the executor-creditor: Therefore, for obviating such frauds in time coming, His Majesty, with advice and consent of the Estates of Parliament, statutes, ordains, and declares, That the nearest-of-kin, and others intrometters with the moveables of any defunct, who are not executors confirmed to them, nor hath right from the executor-creditor before his intromission, are and shall be lyable as vitious intrometters, notwithstanding that there is a third party confirmed executor in a particular debt or subject.(*r*)

VIII.—*ACT* 1701, *c.* 14 : *Act Discharging the Quoats of Testaments.*(*s*)

Our Soveraign Lord, considering that by the twenty-eighth Act of the first parliament of King Charles the Second, quoats of testa-

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(*p*) See §§ 196-199 *supra* as to procedure now in appointment of executors-dative.

(*q*) Confirmation in certain cases unnecessary, § 195 *supra*.

(*r*) See on this subject § 134 *supra*.

(*s*) The quote of the testament formed the twentieth part of the moveable estate left by a deceased person, and was in early times payable to the bishop of the diocese. The right of the bishop came to be acknowledged soon after the reign of David I.,

ments are discharged to be exacted from any of His Majesty's leidges by commissars or the clerks and fiscals, or any others, but prejudice of the ordinary fees due to the said commissars, their clerks and fiscals as accords; which Act was only taken away by the restoring of Episcopacy, which is now abolished: Do therefore, with advice and consent of the Estates of Parliament, revive and ratify the said twenty-eighth Act of the first parliament of King Charles the Second, and discharges all quoats of testaments fallen due since the Act of Parliament, 1689, abolishing prelacy, to be exacted from any of His Majesty's leidges, either by commissars or their clerks and fiscals. And farder declares, any bonds or securities given for the said quoats to be void, and ordains the same to be given up to the granters thereof, but prejudice to His Majesty, to cause call the said commissars, their clerks and fiscals, to an account for any sums of the saids quoats hereby discharged, received by them before the making of this Act.

IX.—4 *Geo. IV. c.* 98 : *An Act for the better Granting of Confirmations in Scotland.*—[19*th July*, 1823.](*t*)

WHEREAS it is expedient that provision should be made for the better granting of confirmations in certain cases in Scotland: Be it therefore enacted by the King's Most Excellent Majesty, &c., that from and after the passing of this Act, in all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next-of-kin, shall die before confirmation be expede, the right of such next-of-kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have

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and at first was regarded as preferable even to the rights of creditors. This preference, however, having become a grievance, the Act 1641, c. 61, was passed, prohibiting the exaction of quote for the future, and this Act was revived after the Restoration by the 1661, c. 28. The quote was, however, restored to bishops in the following year by 1662, c. 1; but by 1669, c. 19, it was declared that it should be paid only out of the free gear. The present Act of 1701, it will be seen, revives the Act of 1661 discharging the quote, but it reserves certain fees which came afterwards to be known under the name of "composition dues."

(*t*) This Act is not retrospective.—*Greig* v. *Malcolm*, 5th March, 1835, 13 S. 607, But the expression "any person or persons who being next-of-kin *shall* die before confirmation be expede," has been interpreted to extend the benefit of its provisions to all next-of-kin surviving the passing of the Act, although the succession opened previous to its date.—*Cunningham* v. *Farie*, 15th Jan. 1856, 18 D. 312.

been granted to such next-of-kin immediately upon the death of such intestate.(*u*)

II. And be it further enacted, that from and after the first day of January, 1824, caution shall not be required to be found by executors-nominate; and in all other cases the court granting confirmation shall fix the amount of the sum for which caution shall be found by the person or persons to whom confirmation shall be granted, not exceeding the amount confirmed.(*v*)

III. And be it further enacted, that from and after the first day of January, 1824, every person requiring confirmation shall confirm the whole moveable estate of a deceased person known at the time, to which such person shall make oath: Provided always that it shall and may be lawful to eik to such confirmation any part of such estate that may afterwards be discovered, provided the whole of such estate so discovered shall be added upon oath as aforesaid: Provided nevertheless that nothing herein contained shall affect or alter the provision made with respect to special assignations by an Act of the

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(*u*) Previous to the passing of this Act confirmation was necessary, not only to give the executor a title, but also (except in the cases stated in § 195 *supra*, where the title was unnecessary) to vest the beneficial interest in the next-of-kin, so that when the latter died without having obtained confirmation, no right transmitted to their creditors or personal representatives.—Ersk. 3, 9, 30. But this Act vests the right of succession in the next-of-kin by mere survivance, to the effect of transmitting it not only to their legal representatives, but to assignees (*Smith* v. *Thomson*, 9th Feb. 1830, 8 S. 468), and creditors (*Mein* v. *M'Call*, 7th June, 1844, 6 D. 1112). Whilst the characters of the next-of-kin and personal representatives became thus irrevocably fixed at the time of the death of the predecessor as regards *moveable* succession, it was held in *Robertson* v. *Gilchrist*, 25th Jan. 1828, 6 S. 446, that in *heritable* succession the right vested only by service; and this strange anomaly in the law of succession continued until the passing in 1874 of the 37 & 38 Vict. c. 94. —See § 9 of that Act below.

An interest is said to vest in a beneficiary when he acquires an indefeasible right to it. The vesting cannot take place until the predecessor's death, and then only after the elements of time, person and interest are specifically ascertained. Where the distribution is to take place at the death of the predecessor no difficulty usually presents itself, but where the distribution is postponed difficulties not infrequently arise. Generally, however, in a bequest, say (1) to one person in liferent and to another in fee, the fee will vest at the death of the testator even though a trust be interposed (*Nimmo* v. *Murray's Trs.*, 3rd June, 1864, 2 Macph. 1144; *Jackson*, 18th March, 1876, 3 R. 627; *Taylor*, 12th July, 1878, 5 R. (H. of L.) 217); (2) to a parent in liferent allenarly, and children *nascituri* in fee, the right of the children vests as they come into existence (*Douglas* v. *Thomson*, 7th Jan. 1870, 8 M. 374); (3) to children equally in liferent allenarly and the survivor, and to their children equally in fee, the share of a liferenter accresces to the surviving liferenters, and on the death of the last liferenter the property passes to the fiars (*Fergus, &c.*, 13th July, 1872, 10 M. 968).

As to the effect of the birth of a nearer heir after the succession opens, see *Logan Home* v. *Logan*, 13th July, 1880, 7 R. 1137.

The subject of vesting is fully discussed in M'Laren, § 1391 *et seq.* See also § 80 *supra*.

(*v*) As to finding caution see §§ 182-187 *supra*.

Scottish Parliament made in the year 1690, intituled, "Act anent the Confirmation of Testaments."(*w*)

IV. Provided further, and be it enacted, that in the case of confirmation by executor's creditor(*x*), such confirmation may be limited to the amount of the debt and sum confirmed to which such creditor shall make oath: Provided always that notice of every application for confirmation by any executor's creditor shall be inserted in *The Edinburgh Gazette*, at least once, immediately after such application shall be made; in evidence whereof, a copy of the *Gazette* in which such notice shall have been inserted shall be produced in court before any such confirmation shall be further proceeded in.

X.—*ACT to alter in certain respects the Law of Intestate Moveable(y) Succession in Scotland,* 18 *Vict. c.* 23.—[25*th May,* 1855.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. *The Issue of a predeceasing next-of-kin(a) shall come in the place of their parent in the succession to an intestate.*—In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next-of-kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue(*b*) of any such child or children, or of any descendant of such child or children who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which

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(*w*) The Act here referred to is printed above.

(*x*) Procedure stated in §§ 196-199 *supra.*

(*y*) For a description of moveable estate, see § 83 *supra.*

(*a*) As to who are termed "next-of-kin," see § 84 *supra.* The next-of-kin are determined at the opening of a succession, 4 Geo. IV. c. 98 *supra.*—*Ewart, &c.*, 6th Dec. 1870, 8 S. L. R. 182.

(*b*) The word "issue" has no technical meaning in law, and is capable of applying to descendants in any degree, according to the context in which it is used. In the ordinary case, the term means children as opposed to more remote descendants. —*King, &c.*, 13th July, 1883, 20 S. L. R. 789.

the parent of such child or children or of such issue, if he had survived the intestate, would have been entitled(*c*): Provided always, that no representation shall be admitted among collaterals(*d*) after brothers' and sisters' descendants, and that the surviving next-of-kin of the intestate claiming the office of executor shall have exclusive right thereto, in preference to the children or other descendants of any predeceasing next-of-kin, but that such children or descendants shall be entitled to confirmation when no next-of-kin shall compete for said office.(*e*)

II. *Issue of predeceasing heir succeeding to the intestate's heritage may collate, but other issue not excluded by his not collating from claiming out of moveable estate difference between value of heritage and share their parent would have taken on collation.*—Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser, being heirs-portioners

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(*c*) This section applies only to the case where some of the next-of-kin, within the limits of relationship stated therein, have predeceased the intestate leaving issue, who, but for this Act, would have been excluded from participating in the succession.

Accordingly, it was held that the children of a deceased sister were entitled to participate along with surviving brothers, the former *per stirpes* and the latter *per capita*.—*Nimmo* v. *Murray's Trs.*, 3rd June, 1864, 2 Macph. 1144.

But where the nearest surviving relatives are all of equal degree—*e.g.*, nephews and nieces, they are entitled to the succession *per capita*, and not as representatives of their deceased parents *per stirpes*.—*Turner* v. *Couper*, 27th Nov. 1869, 8 M. 222. See § 125 *supra*, as to the operation of the rules of division *per capita* and *per stirpes*.

(*d*) The expression "collaterals" used here, means collateral relations of the intestate. Cousins-german succeeding as next-of-kin are collaterals.—*Ormiston* v. *Broad*, 11th Nov. 1862, 1 Macph. 10.

The proviso that "no representation shall be admitted among collaterals *after* brothers' and sisters' descendants," was held to exclude the children of predeceasing cousins-german from claiming, on the principle of representation, to share the succession with surviving cousins-german.—*Ormiston*, *supra*.

(*e*) See §§ 135-141 *supra* as to the circumstances under which executors are appointed, and the manner of their appointment.

All who are equally entitled to the succession are entitled to be conjoined in the administration of it.—*Webster* v. *Shiress*, 25th Oct. 1878, 16 S. L. R. 45.

The next-of-kin being creditors of the intestate, may, without any title, sue the executor-dative for an account of his intromissions.—*Smith* v. *Smith*, 24th June, 1880, 7 R. 1013.

Confirmation is in certain cases unnecessary. See § 195 *supra*.

of the intestate, shall be entitled to collate to the like effect; and where, in the case aforesaid, the heir shall not collate, his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation.(*f*)

III. *Father to succeed to extent of one-half when no issue.*—Where any person dying intestate shall predecease his father without leaving issue, his father shall have right to one-half of his moveable estate(*g*), in preference to any brothers or sisters or their descendants who may have survived such intestate.

IV. *Where father has predeceased, mother to succeed to extent of one-third.*—Where an intestate dying without leaving issue whose father has predeceased him shall be survived by his mother, she shall have right to one-third of his moveable estate, in preference to his brothers and sisters or their descendants, or other next-of-kin of such intestate.(*h*)

V. *Succession by brothers- and sisters-uterine.*—Where an intestate dying without leaving issue, whose father and mother have both predeceased him, shall not leave any brother- or sister-german or consanguinean, nor any descendant of a brother- or sister-german or consanguinean, but shall leave brothers- and sisters-uterine, or a brother- or sister-uterine, or any descendant of a brother- or sister-uterine, such brothers- and sisters-uterine and such descendants in place of their predeceasing parent shall have right to one-half of his moveable estate.(*i*)

VI. *On a wife predeceasing her husband her representatives to have no claim on the goods in communion.*—Where a wife shall predecease her husband, the next-of-kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy or bequest or

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(*f*) The doctrine of collation is explained under §§ 120-123 *supra*.

(*g*) "Moveable estate" means the *free* moveable estate; consequently if the intestate were, for example, survived by a widow, his father, and brothers or sisters, the father would take only one-half of the one-half of the estate, or one-half after deducting the widow's legal share of *jus relictæ* and all debts, or one-fourth of the whole estate. As to the operation of the right of *jus relictæ*, see §§ 91-98 *supra*.

(*h*) See note(*g*). The mother in this case takes the place of the father, excepting that she gets one-third instead of one-half of the clear succession.

This section has been held to give the mother sufficient interest to be confirmed executrix *qua* mother jointly with a widow *qua* relict.—*Muir*, 3rd Nov. 1876, 14 S. L. R. 24.

(*i*) As to uterine and maternal relations see §§ 87, 88 *supra*.

testamentary disposition thereof by such wife affect or attach to the said goods or any portion thereof.(*k*)

VII. *Not to affect rights of spouses on dissolution of marriage in certain cases.*—Where a marriage shall be dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid.(*l*)

VIII. *Part of Act of Parliament of Scotland*, 1617, *c.* 14, *repealed.*—So much of an Act of the Parliament of Scotland passed in the year one thousand six hundred and seventeen, and intituled "Anent Executors"(*m*), as allows executors-nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased, is hereby repealed, and executors-nominate shall, as such, have no right to any part of the said estate.

IX. *Interpretation of terms.*—The words "intestate succession" shall mean and include succession in cases of partial as well as of total intestacy; "intestate" shall mean and include every person deceased who has left undisposed of by will the whole or any portion of the moveable estate in which he might, if not subject to incapacity, have tested; "moveable estate" shall mean and include the whole free moveable estate on which the deceased, if not subject to incapacity, might have tested, undisposed of by will, and any portion thereof so undisposed of.

(*k*) Previous to the passing of this Act a married woman might make an effectual will of her own moveable property without the consent of her husband.—Ersk. 1, 6, 28; *Miller* v. *Milner's Trs.*, 3rd Feb. 1859, 21 D. 377. And as regards property settled on her exclusive of her husband's *jus mariti* and right of administration, she might, as if single, grant deeds respecting it to take effect either *inter vivos* or after her death.—*Gordon* v. *Gordon*, 16th Nov. 1832, 11 S. 36.

This section, which has no retrospective effect (*Kennedy* v. *Bell*, 1st June, 1864, 2 Macph. 587) affects the wife's former rights merely as regards the "goods in communion." What these consist of have been already explained, § 89.

The operation of the doctrines of the *jus mariti* and right of administration, as affected by the Married Women's Property Act, 1881, and the previous Conjugal Rights Acts, have been also explained, § 90 *supra;* also, notes on the Act of 1881 below.

By the Married Women's Property Act, 1881 (printed below), a woman married after its date to a man domiciled *at the time of the marriage in Scotland*, is rendered practically independent of her husband as respects her own property.

(*l*) See § 261 *supra.*

(*m*) This Act "anent executors" is printed above.

XI.—*ACT to amend the Law relating to the Confirmation of Executors in Scotland, and to extend over all parts of the United Kingdom the effect of such Confirmation, and of Grants of Probate and Administration,* 21 & 22 *Vict. c.* 56.—[23*rd July,* 1858.](*n*)

WHEREAS it is expedient to amend the law relating to the confirmation of executors in Scotland, and to extend over the United Kingdom the effect of such confirmation, and of grants of probate and administration(*o*): Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. *Practice of raising edicts of executry to cease.*—From and after the 12th day of November, 1858, the practice of raising edicts of executry before the commissary-courts in Scotland(*p*), for the decerniture of executors to deceased persons, shall cease and it shall not be competent to any person to obtain himself decerned executor in virtue of any such edict raised subsequently to the date aforesaid.(*q*)

II. *Petition to commissary to be substituted—Form of petition as in schedule* (*A*).—From and after the date aforesaid every person desirous of being decerned executor of a deceased person(*r*) as disponee, next-of-kin, creditor, or in any other character whatsoever now competent, or of having some other person, possessed of such character, decerned executor to a deceased person, shall, instead of applying, as heretofore, for an edict of executry from the commissary, present a petition to the commissary for the appointment of an executor, which petition shall be in the form as nearly as may be of the schedule (A) hereunto annexed, and shall be subscribed by the petitioner or by his agent.(*s*)

III. *To whom petition to be presented.*—Such petition shall be presented to the commissary of the county wherein the deceased died domiciled, and in the case of persons dying domiciled furth of

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(*n*) Amended by 22 Vict. c. 30, and 38 & 39 Vict. c. 70 *infra.*

(*o*) See § 195 *supra,* for cases where confirmation is not required.

(*p*) By the Sheriff Courts Act, 1876 (39 & 40 Vict. c. 70, § 35), the commissary-courts are abolished, and the whole provisions and jurisdictions thereof transferred to the Sheriff.

(*q*) See § 186 *et seq. supra,* as to present procedure in appointment of executors.

(*r*) Nothing in the Act is to affect or alter the procedure in confirmations of executors-nominate.—§ 7 of this Act.

(*s*) If a second petition be presented, intimation must be made to the first petitioner.—Act of Sederunt, 1859, art. 5 *infra.*

Scotland, or without any fixed or known domicile, having personal or moveable property in Scotland, to the commissary of Edinburgh.

IV. *Mode of intimating petition.*—Every such petition, in place of being published at the kirk-door and market-cross, as edicts of executry have been in use to be published, shall be intimated by the commissary-clerk affixing on the door of the commissary court-house, or in some conspicuous place of the court and of the office of the commissary-clerk, in such manner as the commissary may direct, a full copy of the petition, and by the keeper of the record of edictal citations at Edinburgh, inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor, which particulars the keeper of the record of edictal citations shall cause to be printed and published weekly along with the abstracts of the petitions for general and special services, in the form of schedule (B) hereunto annexed: Provided always, that to enable the keeper of the record of edictal citations to make such publication, the commissary-clerk shall transmit to him the said particulars, and to enable the commissary-clerk to grant the certificate after-mentioned, the keeper of the record of edictal citations shall transmit to the commissary-clerk a copy, certified by the said keeper, of the printed and published particulars, all in such form and manner and on paymentof such fees as the Court of Session by Act of Sederunt may direct.(*t*)

V. *Certificate of intimation of petition—Additional intimation of petition in certain cases.*—The commissary-clerk, after receiving the certified copy of the printed and published particulars, shall forthwith certify on the petition that the same has been intimated and published, in terms of the provisions of this Act, in the form of schedule (C) hereunto annexed(*u*), and such certificate shall be sufficient evidence of the facts therein set forth: Provided always, that where a second petition for confirmation is presented in reference to the same personal estate, the commissary shall direct intimation of such petition to be made to the party who presented the first petition.

VI. *Procedure on petition—Decree-dative—Proviso as to caution.*—On the expiration of nine days after the commissary-clerk shall have certified the intimation and publication of a petition for the appointment of an executor as aforesaid, the same may be called in court, and an executor decerned, or other procedure may take place according to the forms now in use in case of edicts of executry, and

(*t*) See Act of Sederunt, 1859, arts. 1-3 *infra*.

(*u*) By § 44 of 39 & 40 Vict. c. 70, Schedule (C) is repealed and another form of intimation substituted. See also art. 4 of Act of Sederunt, 1859.

with the like force and effect; and decree-dative may be extracted on the expiration of three lawful days after it has been pronounced, but not sooner: Provided always, that nothing herein contained shall alter or affect the law as to executors finding caution; and that bonds of caution for executors may be partly printed and partly written.

VII. *Not to affect present procedure.* — Provided always, that nothing herein-before contained shall alter or affect the course of procedure now in use before the commissaries in confirmations of executors-nominate.

VIII. *Where inventories, &c., may be recorded—Confirmations may be granted.*—Inventories of personal estates of deceased persons and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any commissary-court to which it is competent to apply in virtue of the provisions of this Act for the appointment of an executor-dative to the deceased.(*v*)

IX. *Inventory may include personal estate in any part of United Kingdom.*—From and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England, or in Ireland, or both: Provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile: Provided also, that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.(*w*)

X. *Form and effect of confirmations.*—Confirmations shall be in the form, or as nearly as may be in the form, of schedules (D) and (E) hereunto annexed; and such confirmations shall have the same force and effect with the like writs framed in terms of the Acts of Sederunt passed on the 20th December, 1823, and the 25th February, 1824, or at present in use.

XI. *Oaths, before whom to be taken.*—Oaths and affirmations on inventories of personal estates given up to be recorded in any commissary-court may be taken either before the commissary or his depute, or the commissary-clerk or his depute, or before any commissioner appointed by the commissary, or before any magistrate or

(*v*) The Act applies to every description of executor.—M'Laren, § 1694.
(*w*) This and following sections amended by §§ 41-44 of 39 & 40 Vict. c. 70 *infra*.

justice of the peace within the United Kingdom, or the colonies, or any British consul.

XII. *Confirmation produced in Probate Court of England, and sealed, to have the effect of probate or administration.*—From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said court of probate.(*x*)

XIII. *Confirmation produced in Probate Court of Dublin, and sealed, to have the effect of probate or administration.*—From and after the date aforesaid, where any confirmation of the executor of a person who shall so be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in Ireland, shall be produced in the Court of Probate in Dublin, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in Ireland as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate in Dublin.(*y*)

XIV. *Probate or letters of administration produced in commissary-court and certified, to have effect of confirmation.*—From and after the date aforesaid, when any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced

(*x*) See § 233 *supra*, as to the sealing in England of a Scotch confirmation. See *Ewing* v. *Ewing*, *&c.*, 30th November, 1883 (H. L.), as to the right of the Court of Chancery to interfere in the management of a purely Scottish estate managed by Scottish trustees where one of the beneficiaries is in England.

(*y*) The provisions of this and previous section amended by § 42 of 39 & 40 Vict. c. 70 *infra*.

in the Commissary-Court of the county of Edinburgh, and a copy thereof deposited with the commissary-clerk of the said court; the commissary-clerk shall endorse or write on the back or face of such grant a certificate in the form as near as may be of the schedule (F) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland as if a confirmation had been granted by the said court.(*a*)

XV. *For securing the stamp duties, probates, &c., to be deemed granted for all the property in the United Kingdom—Inventory to include all such property.*—In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in England or in Ireland, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp duties, be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, within the meaning of the Act of Parliament passed in the fifty-fifth year of the reign of King George the Third, chapter 184, and of all other Acts of Parliament granting or relating to stamp duties on probates and letters of administration in England and Ireland respectively; and the affidavit required by law to be made on applying for probate or letters of administration in England or Ireland as to the value of the estate and effects of the deceased; and also where the commissary shall in manner aforesaid find that the deceased was domiciled in Scotland, the inventory required by law to be exhibited and recorded in the proper commissary-court in Scotland before obtaining confirmation, or intromitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in Scotland, shall respectively extend to and include the whole of the personal and moveable estate of the deceased person in the United Kingdom, and the value thereof; and the stamp duties for the time being chargeable on probates and letters of administration and on inventories respectively shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, and the value thereof; and the said affidavit shall also separately specify the value of the said estate and effects in Scotland.

(*a*) The provisions of this section held not to apply to the case of an administrator appointed in England for a limited and temporary purpose to a deceased foreigner who left personal property in Scotland.—*Whiffin* v. *Lees*, 12th June, 1872, 10 M. 797.

XVI.—*Provisions of former Acts to apply to the probates, letters of administration, and inventories mentioned in this Act.*—For the purpose aforesaid, and also for granting relief where too high a stamp duty shall have been paid on any such probate or letters of administration, or inventory, the provisions contained in §§ 40, 41, 42, and 43 of the said Act passed in the fifty-fifth year of His Majesty King George the Third, relating to probates and letters of administration granted in England, and the like provisions in the Act passed in the fifty-sixth year of the said king, c. 56, relating to probates and letters of administration granted in Ireland, and the *provisions contained in the Act passed in the forty-eighth year of the said King, c.* 149, *relating to inventories in Scotland,* and also all other provisions contained in the said Acts respectively, or in any other Act or Acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration to which effect is given by this Act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively.(*b*)

XVII.—*Affidavit as to domicile to be made on applying for probate or administration.*—Provided, That in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in England or in Ireland, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorise the same to be so stated in or upon the probate or letters of administration: Provided also, that any such statement, and the interlocutor of the commissary finding that the deceased was domiciled in Scotland, shall be evidence, and have effect for the purposes of this Act only.(*c*)

XVIII.—*Acts of Sederunt to be passed for following out purposes of this Act.*—It shall be competent to the Court of Session, and they are hereby authorised and required, from time to time, to pass such

(*b*) See §§ 169-171 as to estates under £300 in value.

(*c*) See § 34 of 44 Vict. c. 12, *infra*, as to inventories where gross value of estate does not exceed £300. The provision applies wherever the deceased may be domiciled at the time of death.

Acts of Sederunt as shall be necessary and proper for regulating in all respects the proceedings under this Act before the commissary of Edinburgh, and other commissaries in Scotland, and following out the purposes of this Act, and also the fees to be paid to agents before the said courts, and to the commissary-clerks and other officers of court, and the expense of publication of petitions.(*d*)

XIX.—*Former Acts of Sederunt repealed if inconsistent with this Act.*—All former Acts, and Acts of Sederunt made in virtue thereof, so far as inconsistent with the present Act, are hereby repealed; and this Act may be amended or repealed by any Act to be passed during the present session of Parliament, and may be cited as the "Confirmation and Probate Act, 1858."

XX.—*Interpretation of terms.*—The word "commissary" shall include commissary-depute, and the term "commissary-clerk" shall include commissary-clerk-depute.

SCHEDULES TO WHICH THE FOREGOING ACT REFERS.

SCHEDULE (A).—*Form of a Petition for appointment of an Executor to a deceased person.*

Unto the Honourable the Commissary of [*specify the county*], the petition of A. B. [*here name and design the petitioner*];

Humbly showeth,—That the late C. D. [*here name and design the deceased person to whom an executor is sought to be appointed*] died at [*specify place*] on or about the [*specify date*], and had at the time of his death his ordinary or principal domicile in the county of [*specify county, or,* furth of Scotland, *or,* without any fixed domicile, *or,* without any known domicile, *as the case may be*].

That the petitioner is the only son and next-of-kin [*or state what other relationship, character, or title the petitioner has, giving him right to apply for the appointment of executor*].

May it therefore please your Lordship to decern the petitioner executor-dative *qua* next-of-kin to the said C. D. [*or state the other character in which the petitioner claims to be appointed executor*].

According to Justice, &c.

[*Signed by the petitioner or his agent.*]

(*d*) See Act of Sederunt, 1859, *infra.*

SCHEDULE (B).—*Roll of Petitions for the Appointment of Executors in Commissary-Courts in Scotland.*

County.	Name and Designation of Petitioner.	Title of Petitioner.	Name and Designation of Defunct.	Place and Date of Death.
Edinburgh.	A. B., Writer in Edinburgh.	Next-of-Kin.	C. D., Merchant, Edinburgh.	No. George Street, Edinburgh, 1st Jan. 1857.

SCHEDULE (C)(*e*).—*Form of Certificate by Commissary-Clerk of publication of a Petition for the appointment of an Executor.*

I, A. B., commissary-clerk [*or*, commissary-clerk-depute, *as the case may be*,] of the county of [*specify county*], hereby certify that this petition was intimated by affixing a copy thereof on the door of the court-house [*if some other place has been directed by the commissary, specify it*], on the [*specify date*], and by being published by the keeper of the record of edictal citations at Edinburgh, in the printed roll of petitions for the appointment of executors in the commissary-courts of Scotland, printed and published on [*specify date*].

A. B.

SCHEDULE (D.)—*Form of a Testament-Dative or Confirmation of the Executor of a person who has died without naming one.*

I, A. B., commissary of the county of [*specify county*], considering that by my decree, dated [*specify date*], I decerned C. D., executor-dative *qua* next-of-kin [*or other character, as the case may be*], of the late E. F., who died at [*specify place*], on [*specify date*], and seeing that the said C. D. has since given up on oath an inventory of the personal estate and effects of the said E. F. at the time of his death situated in Scotland [*or*, situated in Scotland and England, *or*, in Scotland and Ireland, *or*, in Scotland, England, and Ireland, *as the case may be*], amounting in value to pounds, which inventory has been recorded in my court books, of date [*specify date*], and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in Her Majesty's name and authority, make, constitute, ordain, and confirm the said C. D. executor-dative *qua* [*specify character*] to the defunct with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and

(*e*) This schedule repealed and another form substituted by 39 & 40 Vict. c. 70, § 44, *infra*.

generally every other thing concerning the same to do that to the office of executor-dative *qua* [*specify character*] is known to belong: Providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot [*specify county*] and signed by the clerk of court at [*specify place*], the [*specify date*].

To be signed by the commissary-clerk or his depute, and sealed with the seal of office.

SCHEDULE (E).—*Form of a Testament-Testamentar or Confirmation of an Executor-Nominate.*

I, A. B., commissary of the county of [*specify county*], considering that the late C. D. died at [*specify place*], upon [*specify date*], and that by his last will [*or other writing containing the nomination of executor*], dated [*specify date*], and recorded in my court books upon [*specify date*], the said C. D. nominated and appointed E. F. to be his executor, and that the said E. F. has given up on oath an inventory of the personal estate and effects of the said C. D. at the time of his death situated in Scotland [*or*, situated in Scotland and England, *or*, situated in Scotland and Ireland, *or*, situated in Scotland, England, and Ireland, *as the case may be*,] amounting in value to pounds, which inventory has likewise been recorded in my court books of date [*specify date*],: Therefore I, in Her Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained in the foresaid last will [*or other writing containing the momination of executor*]; and I give and commit to the said E. F. full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor nominate is known to belong: Providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of [*specify county*], and signed by the clerk of court at [*specify place*], the [*specify date*].

To be signed by the commissary-clerk or his depute, and sealed with the seal of office.

SCHEDULE (F).

I, A. B., commissary-clerk [*or*, commissary-clerk-depute] of the county of Edinburgh, hereby certify that this grant of probate has [*or*, these letters of administration have] been produced in the Commissary-Court of the said county, and that a copy thereof has been deposited with me.

XII.—*ACT to regulate Proceedings before Commissaries, and the Fees of Clerks of Commissary-Courts, under the Act of Parliament*, 21 & 22 *Vict. c.* 56.—[19*th March*, 1859.]

THE Lords of Council and Session, in pursuance of the powers vested in them by the said Act [§§ 4 and 18], do hereby enact and declare—

I. That when a petition is presented to the commissary for the appointment of an executor, the commissary-clerk of Edinburgh shall transmit, in a safe and convenient manner, and the other commissary-clerks shall transmit, through the post-office, to the keeper of the record of edictal citations at Edinburgh, a note specifying the names and designations of the petitioner, and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor; and the said note of particulars shall be framed as nearly as may be in the form of schedule (B) annexed to the said Act, and shall be dated and subscribed by the commissary-clerk.

II. That the keeper of the record of edictal citations shall transmit, through the post-office, to the commissary-clerk, a certified copy of the printed and published particulars, in the form of schedule (B) annexed to the said Act, and which copy shall be dated and subscribed by the said keeper, and the said certified abstracts shall be preserved by the commissary-clerk, and made patent to all persons desiring to see the same, on payment of the fee specified in the table hereto annexed.(*f*)

III. That the copies of the abstracts of petitions for the appointment of an executor shall be printed by the keeper of the record of edictal citations, and sold to the public at such prices as may be estimated to be sufficient to pay the expense of printing the same; and

(*f*) See additional duties imposed on clerks, and modified fees allowed them by § 34 of 44 Vict. c. 12, and Acts there cited.

the printing and sale of the said abstracts shall be subject to the same regulations as those applicable to the minute-book and record of edictal citations, by the 22nd section of the Act 1 & 2 Vict. c. 118.

IV. That the certificate of intimation to be granted by the commissary-clerk, in terms of § 5 and schedule (C) of the Act, shall be dated, and the date of the certificate shall regulate the time when the petition for appointment of an executor may be called in court, in terms of § 6 of the Act.

V. That when a second petition for confirmation is presented in reference to the same personal estate, intimation shall be made to the party who presented the first petition, in terms of the 5th section of the Act; and in all other respects the procedure regarding such second petition shall be the same as that directed by the statute and this Act in regard to a first petition.

VI. That when a party shall be desirous to include in the inventory the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate or effects of the deceased situated in England or in Ireland, or both, a statement to that effect shall be made, either in the original petition for appointment of an executor, or in a separate petition to be presented to the commissary.

VII. That the certificate to be granted by the commissary-clerk of the county of Edinburgh upon grants of probate and administration, in terms of § 14 and schedule (F) of the Act, shall be dated as well as subscribed by him.

VIII. That all copies of probates or letters of administration deposited with the commissary-clerk of the county of Edinburgh, under the 14th section of the said Act, shall be made patent to all persons desiring to see the same, on payment of the fee specified in the table hereto annexed; and when required the said commissary-clerk shall furnish copies or excerpts of said documents, on payment of the fee specified in the said table.

IX. That the practitioners in the commissary-courts shall be entitled to charge the fees contained in the table authorised by the Act of Sederunt of 10th March, 1849, so far as applicable to the proceedings under the said Act of 21 & 22 Vict. c. 56.

X. That from and after the 1st day of April next, the clerks of all commissary-courts shall be entitled to charge the fees specified in the table hereto annexed until the same shall be altered in terms of law, and no other or higher fees shall be charged by them.

XI. That the said clerks and their successors in office, shall enter

in a book to be kept by them for the purpose, an accurate account of the whole fees and emoluments received by them from the commencement of this Act, and shall, on the 1st of April in each year, or within ten days thereafter, transmit to the Queen's Remembrancer in Exchequer an abstract of the fees and emoluments received by them for the year immediately preceding, in order that the amount of such fees and emoluments may be known.

And the Lords appoint this Act, and the relative table of fees, to be inserted in the Books of Sederunt, and printed and published in common form.

DUN. M'NEILL, *I.P.D.*

XIII.—*ACT to amend the Confirmation and Probate Act, 1858, 22 Vict. c. 30.*—[19*th April*, 1859.]

I. ALL persons and corporations, who in reliance upon any instrument purporting to be a confirmation granted under the "Confirmation and Probate Act, 1858," and all persons and corporations who, in reliance upon any such instrument which may be sealed under the authority of the said Act with the seal of the Principal Court of Probate in England, or of the Court of Probate in Dublin, and all persons or corporations who, in reliance upon any instrument purporting to be a probate or letters of administration granted by the Court of Probate in England, or Court of Probate in Dublin, and having endorsed or written thereon a certificate by the commissary-clerk of Edinburgh, in the form in the said Confirmation and Probate Act prescribed, shall have made or permitted to be made, or shall make or permit to be made, any payment or transfer *bona fide* upon any such confirmation, probate, or letters of administration, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such confirmation, probate, or letters of administration.

II. This act may be cited as the "Confirmation and Probate Amendment Act, 1859."

XIV.—*ACT to amend the Law regarding Conjugal Rights in Scotland, 24 & 25 Vict. c. 86.*—[*6th August,* 1861.](g)

WHEREAS it is expedient to amend the law of Scotland relating to husband and wife: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

(g) This Act came into operation on 1st November, 1861. At this time, England and Scotland commenced to pass a series of enactments affecting the property of married women. England began by passing, in the year 1857, an Act (20 & 21 Vict. c. 85), titled "An Act to amend the Law relating to Divorce and Matrimonial Causes," by which a wife deserted by her husband was entitled to apply to the Court for the protection of her earnings and her property, and in cases of judicial separation she was to be considered a feme sole with respect to all property she might acquire. And in the following year it passed another Act (21 & 22 Vict. c. 108) to amend the former Act, by which it provided increased facilities for the protection of married women's property. Scotland followed by passing the present Act, very much upon the lines, excepting as regards procedure, of the two English Acts. England started off again and passed the 33 & 34 Vict. c. 93 (1870) "to amend the law relating to the property of Married Women," by which it declared the earnings of married women to be their own property, provided for certain classes of property to be their separate estate, such as money deposited in a savings-bank, money in the Funds, shares in a joint-stock company, and investments in friendly, provident, and industrial societies; gave limited protection in regard to real estate, and large powers to protect the property thus conferred on them by civil or criminal proceedings taken in their own names. Scotland followed again by passing the Conjugal Rights Amendment Act, 1874 (37 & 38 Vict. c. 31), by which, on the narrative, that "the expense of procedure under the former Act prevented many persons from availing themselves of its benefits," it conferred increased facilities to that end. In the same year England started off afresh and passed the 37 & 38 Vict. c. 50, "to amend the Married Women's Property Act, 1870," by which is enacted certain provisions relating to the liability of husbands for debts contracted or torts committed by their wives before marriage. Scotland followed, in 1877, by passing the 31 & 38 Vict. c. 31, which enacted in substance the first section of the English Act 33 & 34 Vict. c. 93, and section 2 of the English Act 37 & 38 Vict. c. 50. Here Scotland took the lead and passed one of the most extraordinary and anomalous pieces of social legislation ever placed on the statute-book, in the Act 44 & 45 Vict. c. 21 (1881), titled "An Act for the amendment of the law regarding the property of Married Women in Scotland." This Act (printed *infra*) renders a married woman practically independent of her husband. It leaves the former Acts unrepealed, and presents abundant scope for litigation. England in the following year (1882) followed suit with a measure (45 & 46 Vict. c. 75) titled "The Married Women's Property Act, 1882," which consolidates and extends the provisions of the two previous Acts of 1870 and 1874, both of which are repealed.

As the two first English Acts of 1857-58 are still in force, it may be useful here to reproduce the provisions in them which correspond to the provisions in the Scotch Acts. The first of these (20 & 21 Vict. c. 85) is titled "An Act to Amend the Law relating to Divorce and Matrimonial Causes in England," 28th August, 1857:—

"XXI. A wife deserted by her husband may at any time after such desertion, if

I. *A wife deserted by her husband may apply for an order to protect property which she has or may acquire by her own industry, or which*

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resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in Petty Sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole: Provided always, that every such order, if made by a police magistrate or justices at Petty Sessions, shall, within ten days after the making thereof, be entered with the Registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof: Provided also, that if the husband or any creditor of or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall he liable at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

"XXIV. In all cases in which the Court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the Court, and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee if for any reason it shall appear to the Court expedient so to do.

"XXV. In every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

"XXVI. In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use; provided also that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

"XXXII. The Court may if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as

she may succeed to.—A wife deserted by her husband may, at any time after such desertion, apply by petition to any Lord Ordinary of

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having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the Conveyancing Counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage the Court shall have the same power to make interim orders for payment of money by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation.

"XLV. In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or in reversion, it shall be lawful for the Court if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."

The second of the said English Acts (21 & 22 Vict. c. 108), is titled "An Act to amend the Act of the 20th & 21st Victoria, Chapter 85," 2nd August, 1858:—

"VI. Every wife deserted by her husband, wheresoever resident in England, may, at any time after such desertion, apply to the said judge-ordinary for an order to protect any money or property in England she may have acquired, or may acquire, by her own lawful industry, and any property she may have become possessed of, or may become possessed of after such desertion, against her husband and his creditors, and any person claiming under him; and the judge ordinary shall exercise in respect of every such application all the powers conferred upon the Court for divorce and matrimonial cause under the 20 & 21 Vict. c. 85. Sect. 21.

"VII. The provisions contained in this Act, and in the said Act of the 20 & 21 Vict. c. 85, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become, or shall become, entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

"VIII. In every case in which a wife shall under this Act or under the said Act of the 20 & 21 Vict. c. 85, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied, or discharged in respect of any debts, contracts, or acts of the wife, incurred, entered into, or done between the times of the making such order or decree, and of the discharge, variation, or reversal thereof; and property of, or to which the wife is possessed, or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be), shall be deemed to be included in the protection given by the order or decree.

"IX. Every order which shall be obtained by a wife under the said Act of the 20 & 21 Vict. c. 85, or under this Act, for the protection of her earnings or property, shall state the time at which the desertion in consequence whereof the order is made commenced; and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced.

"X. All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to, or permit any transfer or act to be made or done

the Court of Session, or in the time of vacation to the Lord Ordinary on the Bills(*h*) for an order to protect property which she has acquired or may acquire by her own industry after such desertion, and property which she has succeeded to or may succeed to or acquire right to after such desertion, against her husband or his creditors, or any person claiming in or through his right; and the Lord Ordinary shall appoint such petition to be intimated in the minute-book of the Court of Session, and to be served upon the husband; and the husband, or any creditor of the husband, or any other person claiming in or through his right, shall be entitled to lodge answers to the said petition, and if the husband be furth of Scotland, the petition shall be executed edictally against him on an *inducice* of twenty-one days; and upon considering such petition the Lord Ordinary shall require evidence of such desertion, and on being satisfied thereof pronounce an interlocutor giving to the wife protection of her property as aforesaid against the husband and all creditors or persons claiming under or through him; and if answers be lodged to the said petition, the Lord Ordinary may, on considering the same, and, if he consider it necessary, after hearing parties, allow a proof to them of their respective averments, which proof he shall take himself, and either write the evidence with his own hand, in which case it shall be read over to the witness by the judge, and signed by the witness, if he can write, or the Lord Ordinary shall record the evidence by dictating it to a clerk, in which case it shall, when taken down, be read over and signed as above; or the Lord Ordinary shall cause the evidence to be taken down and recorded by a writer skilled in shorthand writing, in manner after mentioned, and it shall be competent to the Lord Ordinary, in special cause shown, instead of taking such proof,

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by the wife who has obtained the same, shall, notwithstanding such order or decree may then have been discharged, reversed, or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer, or other act, such order or decree were valid and still subsisting without variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless at the time of such payment, transfer, or other act, such persons or corporations had notice of the discharge, reversal, or variation of such order or decree, or of the cessation or discontinuance of such separation."

(*h*) The jurisdiction of the Sheriff is now extended to applications for orders to protect property of deserted wives, and for the recall of such orders; and the provisions of this Act relative thereto are by the Conjugal Rights Amendment Act, 1861 (37 & 38 Vict. c. 31), declared to apply to such actions in the Sheriff Court.

An order of protection of the wife's property granted where the husband had left his wife for ten years, although he offered to take her back.—*Chalmers* v. *Chalmers*, 4th March, 1868, 40 Jur. 284.

Application by a wife for protection of her property refused, proof of desertion being insufficient.—*Kennedy* v. *Kennedy*, 3rd Feb. 1866, 1 S. L. R. 134.

to grant a commission to take said proof elsewhere than in Edinburgh, in which case he may pronounce an interlocutor setting forth such special cause, and granting commission to take such proof, and if satisfied after proof of the fact of such desertion, and that the same was without reasonable cause, he shall pronounce an interlocutor giving to the wife protection as aforesaid, and he shall appoint intimation of the said interlocutor having been pronounced to be made in one or more newspapers published within the county within which the wife is resident, or in such other newspapers as the Lord Ordinary may appoint.

II. *Husband or creditor may apply by petition for recall of order.*—It shall be lawful for the husband, or any creditor or other person claiming in or through his right, if such creditor, husband, or other person have not lodged answers as aforesaid, to apply by petition to the Lord Ordinary by whom such order was made for the recall thereof; and the Lord Ordinary shall appoint such petition to be answered by the wife, and thereafter dispose of the application as he shall think just; but such recall shall not affect any right or interest onerously and *bona fide* acquired by any third party from the wife before said recall; and the Lord Ordinary shall direct that publication of his interlocutor be made in manner hereinbefore provided.

III. *Interlocutors may be reviewed—How long order of protection to continue operative—No action of adherence competent while order subsists.*—All interlocutors of the said Lord Ordinary may be brought under review of either division of the Court of Session, by lodging and boxing within twenty-one days after the pronouncing of such interlocutors, if in session; and if the said twenty-one days shall expire during vacation, by lodging in the bill-chamber a reclaiming note, and boxing the same at the first box-day after the expiry of the said twenty-one days: Provided always, that notwithstanding such reclaiming note the interlocutor of the Lord Ordinary granting protection shall take effect when intimated as aforesaid, unless the Lord Ordinary, either at the time of the pronouncing thereof, or within forty-eight hours thereafter, order that his interlocutor shall not take effect till the advising of the reclaiming note, or such other period as he may think fit; and such order of protection shall, where there has been appearance by the husband, continue operative until such time as the wife shall again cohabit with her husband, or until the Lord Ordinary, upon a petition by the husband, shall be satisfied that he has ceased from his desertion, and cohabits with his wife; and the Lord Ordinary may require him to find security for such period as may be appointed, that he shall continue to cohabit with her; and upon the Lord Ordinary being so satisfied, and security

found, if required, he shall recall the order of protection; but such recall shall not affect any right or interest acquired by the wife while the said order subsisted, which right and interest shall remain vested in her, exclusive of her husband's *jus mariti* and right of administration; nor shall it affect any right or interest acquired by a third party during such period, or any third party through or from her, while the said order subsisted; and until such order be recalled, it shall not be competent for the husband to institute an action of adherence against his wife; and the Lord Ordinary shall direct that publication of its recall be made in manner hereinbefore provided.

IV. *After interlocutor of protection is pronounced, property of wife to belong to her as if unmarried.*—After an interlocutor of protection is pronounced and duly intimated, the property of the wife as aforesaid shall belong to her as if she were unmarried: Provided always, that such protection shall not extend to property acquired by the wife of which the husband or his assignee or disponee has before the date of presenting said petition obtained full and complete lawful possession, nor shall such protection affect the right of any creditor of the husband over property which he has before the date thereof duly attached by arrestment, followed by a decree of forthcoming, or which such creditor has before the said date duly poinded, and of which he has carried through and reported a sale.

V. *Order of protection to have effect of decree of separation.*—If any such order of protection be made and intimated, it shall have the effect of a decree of separation *a mensa et thoro* in regard to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued.

VI. *In case of separation the property of the wife to belong to her exclusively of the* jus mariti *and right of administration; also for purposes of contract and suing.*—After a decree of separation *a mensa et thoro* obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, in reference to which the *jus mariti* and husband's right of administration are excluded, and such property may be disposed of by her in all respects as if she were unmarried, and on her decease the same shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, and the *jus mariti* and right of administration of her husband shall be excluded in reference thereto, subject, however, to any agreement in writing made between

herself and her husband; and the wife shall, while so separate, be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married; and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as pursuer or defender of any action, after the date of such decree of separation, and during the subsistence thereof; provided that where upon any such separation aliment has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use.

VII. *In action of divorce adulterer to be co-defender.*—In every action of divorce for adultery at the instance of the husband it shall be competent to cite, either at the commencement or during the dependence thereof, as a co-defender along with the wife, the person with whom she is alleged to have committed adultery; and it shall be lawful for the Court in such action to decern against the person with whom the wife is proved to have committed adultery for the payment of whole or any part of the expenses of process, provided he has been cited as aforesaid, and the same shall be taxed as between agent and client: Provided always, that it shall be competent to examine the person with whom the wife is said to have committed adultery as a witness in the cause, notwithstanding he is called as a co-defender in the action, and in the power of the Court, on cause shown, to dismiss such action as regards such co-defender if in their opinion such a course is conducive to the justice of the case.(*i*)

VIII. *Lord Advocate may enter appearance in actions for nullity of marriage and divorce.*—It shall be competent to the Lord Advocate to enter appearance as a party in any action of declarator of nullity of marriage or of divorce; and it shall be competent to him to lead such proof and maintain such pleas as he may consider warranted by the circumstances of the case; and the Court shall, whenever they consider it necessary for the proper disposal of any action of declarator of nullity of marriage or of divorce, direct that it be laid before the Lord Advocate, in order that he may determine whether he should enter appearance therein; and expenses shall not be claimable by or against the Lord Advocate with reference to such cases.(*k*)

(*i*) This section does not confer in Scotch Courts jurisdiction over a co-defender not otherwise subject to them.—*Fraser* v. *Fraser*, 14th Jan. 1870, 8 M. 400.

(*k*) Question whether in an action of divorce it was competent for the Lord Advocate to insist on a plea of condonation withdrawn after being stated by the defender.—See *Ralston*, 13th Jan. 1881, 8 R. 371.

IX. *In action for separation, Court may make interim orders with respect to children.*—In any action for separation *a mensa et thoro* or for divorce, the Court may from time to time make such interim orders, and may, in the final decree, make such provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates.(*l*)

X. *In every consistorial action the summons to be served on defender personally when not within Scotland.*—In every consistorial action the summons shall be served upon the defender personally, when he is not resident within Scotland: Provided always, that if it be shown to the satisfaction of the Court that the defender cannot be found, edictal citation shall be deemed sufficient; but in every case where the citation is edictal the pursuer shall also serve the summons on the children of the marriage, if any, and on one or more of the next-of-kin of the defender, exclusive of the children of the marriage, when the said children and next-of-kin are known, and resident within the United Kingdom, and such children and next-of-kin, whether cited or so resident or not, may appear and state defences to the action.(*m*)

XI. *Not necessary to institute an action of adherence against defender prior to action for divorce.*—It shall not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere.

XII. *Terce claimable from burgage property.*—The widow of any person who shall, after the passing of this Act, die infeft in property

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(*l*) In an action of separation and aliment an order regulating the custody of children may be pronounced although such order is not asked in the summons.—*Symington* v. *Symington*, 20th March, 1874, 1 R. 871.

It is incompetent to make an order for the custody, maintenance, and education of children after decree of separation or divorce is issued.—*Lang* v. *Lang*, 30th Jan. 1869, 7 M. 445.

(*m*) The mode of service here prescribed is amended by § 100 of 31 & 32 Vict. c. 100, which provides that it shall be sufficient compliance with the provision in this section if the personal service therein required is made by the delivery to the defender personally of the summons, by a person (although not a messenger-at-arms or other officer of the law) duly authorised by the pursuer for that purpose, and such person shall return a certificate that such delivery has been made: Provided always that it shall be competent for the Lord Ordinary to call for further evidence of the service by such delivery, if he shall think proper.—See also 45 & 46 Vict. c. 77 (1882), an Act to amend the law of citation in Scotland, which, without abolishing the former mode of service, introduces an entirely new mode of citing parties and witnesses in any civil action or proceeding.

held by burgage-tenure shall be entitled to terce therefrom(*n*); and the like proceedings as to service and kenning before the Sheriff shall be competent in such a case as are competent with reference to property in respect of which terce might have been claimed prior to the passing of this Act.

XIII. *Lord Ordinary to take proofs in consistorial actions.*—The forty-first section of the Act of the first year of his late Majesty William the Fourth, chapter sixty-nine, in so far as it enacted that "it shall be lawful for his Majesty's principal Secretary of State for the Home Department to appoint from time to time such number of persons, being sheriffs-depute of counties, as he shall think fit, to take proofs in consistorial causes, which duty the persons so appointed shall perform;" and the second section of the act of the sixth and seventh years of his late Majesty William the Fourth, chapter forty-one, shall be and the same are hereby repealed; and in place thereof it is hereby enacted, that where proof in consistorial actions shall be allowed, a diet of proof shall be appointed, at which the evidence shall be led before the Lord Ordinary, and he shall take himself, and either write down with his own hand the oral evidence, in which case it shall be read over to the witness by the Judge in open Court, and shall be signed by the witness, if he can write, or the Lord Ordinary shall record the evidence by dictating it to a clerk, in which case it shall in like manner be read over and signed; or the Lord Ordinary shall cause it to be taken down and recorded in shorthand by a writer skilled in shorthand writing, to whom the oath *de fideli administratione officii* shall be administered, and the Lord Ordinary may, if he think fit, dictate to the shorthand writer the evidence which he is to record; and the said shorthand writer shall afterwards write out in full the evidence so taken by him; and the notes of the Judge, or the extended notes of such writer, certified by the presiding Judge to be correct, shall be the record of the oral evidence in the cause; and the Lord Ordinary shall take a note of the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection; and any ruling of the Lord Ordinary in reference to the admission or rejection of evidence may be recalled or altered by the Inner House, under a reclaiming note against the final interlocutor of the Lord Ordinary disposing of the merits of the cause; and the diet of proof may be adjourned by the Lord Ordinary, if he shall consider it proper and reasonable so to do; but the proofs shall be taken as far as may be continuously, and with as little interval as the circumstances or the justice of the

(*n*) The distinction between feudal and burgage-tenure was abolished in 1874 by 37 & 38 Vict. c. 94, *infra*.

case will admit of: Provided always, that it shall be competent to the Lord Ordinary, where any witness or haver is resident beyond the jurisdiction of the court, or by reason of age, infirmity, or sickness is unable to attend the diet of proof, to grant commission to any person competent to take and report in writing, according to the existing practice, the evidence of such witness or haver.(*o*)

XIV. *Payment to certain Sheriffs.*—The Commissioners of Her Majesty's Treasury shall annually pay to each of John Cay, Esquire, Sheriff of the county of Linlithgow; John Tait, Esquire, Sheriff of the counties of Kinross and Clackmannan; Erskine Daniel Sandford, Esquire, Steward of the stewartry of Kirkcudbright, and Sheriff of the county of Wigton; Robert Hunter, Esquire, Sheriff of the counties of Dumbarton and Bute; and Benjamin Robert Bell, Esquire, Sheriff of the counties of Banff, Elgin, and Nairn, out of monies to be voted by Parliament for that purpose, a sum equal to one-fifth of the total amount which shall be ascertained by the Queen and Lord Treasurer's Remembrancer in Exchequer to have been paid annually, on an average of the last three years, to the sheriffs-commissary, in respect of proofs taken by them in consistorial causes; but such sum shall only be paid as long as the said persons shall hold the office of Sheriff in any county in Scotland, and no longer.

XV. *Actions of aliment.*—Actions of aliment in the Court of Session between husband and wife shall not be considered Inner House causes, but shall be considered and disposed of in like manner as other consistorial causes, except as hereinafter provided as to decrees in absence; and actions of aliment at the instance of other parties shall not be considered Inner House causes, but shall be disposed of by the Lord Ordinary (subject in both cases to reclaiming note in common form against his interlocutors) in the same way as such causes are at present disposed of by the Judges of the Inner House: Provided always, that all actions for aliment shall be deemed summary causes both in the Outer and in the Inner House, and that where no appearance is entered for the defender decreet shall be pronounced in absence without proof, as in other cases before the Court of Session.

XVI. *When a married woman succeeds to property, &c., husband or creditor not entitled to claim the same.*—When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the

(*o*) By § 100 of 31 & 32 Vict. c. 100, it is provided that notwithstanding the terms of this section it shall be competent for the Lord Ordinary to grant commission to any person competent to take and report in writing the deposition of a haver according to the existing practice, although such haver shall be resident in Scotland.

husband or his creditors, or ony other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*: Provided always, that no claim for such provision shall be competent to the wife if before it be made by her the husband or his assignee or disponee shall have obtained complete and lawful possession of the property, or, in the case of a creditor of the husband, where he has before such claim is made by the wife attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of furthcoming, or has poinded and carried through and reported a sale thereof.(*p*)

XVII. *Court of Session empowered to make Acts of Sederunt.*—The Court of Session are hereby authorised and empowered to make from time to time such orders and regulations as to forms of process by Acts of Sederunt as they may consider necessary for carrying into execution the purposes of this Act.

XVIII. *Repeal of laws inconsistent with this Act.*—All laws, statutes, and usages are hereby repealed in so far as the same are inconsistent with the provisions of this Act, but no further or otherwise.

XIX. *Interpretation of terms.*—The following words and expressions, when used in this Act, shall, in the construction thereof, be interpreted as follows, except where the nature of the provision or the context of the Act shall exclude or be repugnant to such con-

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(*p*) This section is retrospective.—*Taylor* v. *Taylor*, 23rd June, 1871, 8 S. L. R. 589; 28th Oct. 1871, 9 S. L. R. 22. As to what amounts to a reasonable provision to wife, see *Mason* v. *Small*, *&c.*, 24th Feb. 1870, 7 S. L. R. 332; *Somner* v. *Anderson*, 2nd March, 1871, 8 S. L. R. 388; *Taylor* v. *Taylor*, 28th Oct. 1871, 9 S. L. R. 22.

Question as to reasonable provision where husband obtained possession of property.—See *Clark* v. *Clark*, 25th May, 1881, 8 R. 723.

Question between a wife and trustee on her husband's sequestrated estate as to a reasonable provision.—See *Kinnear* v. *Ferguson*, *&c.*, 7th Nov. 1871, 9 S. L. R. 39; *Reid*, *&c.*, 5th Feb. 1878, 15 S. L. R. 380; *Jack* v. *Ferguson*, 5th Feb. 1878, 5 R. 624. Husband held not bound to make a provision to his wife out of a fund his own absolute property.—*Miller* v. *Learmonth*, 21st Nov. 1871, 9 S. L. R. 95. A trust deed granted by husband and wife securing aliment to the latter, held not revocable by the husband.—*Thomson* v. *Thomson*, 17th Nov. 1868, 6 S. L. R. 110.

struction; that is to say, the expression "Lord Ordinary" shall include his successor; the word "property" shall include and apply to all property falling under the *jus mariti;* the expression "consistorial action" shall include actions of declarator of marriage, of declarator of nullity of marriage, of declarator of legitimacy and bastardy, actions of separation *a mensa et thoro*, of divorce and of adherence, and of putting to silence, and actions of aliment between husband and wife instituted in the Court of Session.

XX. *Short title.*—This Act may in all proceedings be cited as "The Conjugal Rights (Scotland) Amendment Act, 1861."

XXI. *Commencement of Act.*—This Act shall come into operation on the 1st day of November now next ensuing, and not before.

XV.—*ACT to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within Her Majesty's Dominions.*—[24 & 25 *Vict. c.* 121, *6th August,* 1861.]

WHEREAS, by reason of the present law of domicile, the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign States: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows:—

I. *No British subject dying in a foreign country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, &c., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.*—Whenever Her Majesty shall by convention with any foreign State agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of Her Majesty and of such foreign State respectively, it shall be lawful for Her Majesty by any order in council to direct, and it is hereby enacted, That, from and after the publication of such order in the *London Gazette*, no British subject resident at the time of his or her death in the foreign country named in such order shall be deemed

under any circumstances to have acquired a domicile in such country unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing, of his or her intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to moveables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid.

II. *No foreign subject dying in Great Britain or Ireland to be deemed to have acquired a domicile unless resident therein for one year immediately preceding his or her death, &c.*—After any such convention as aforesaid shall have been entered into by Her Majesty with any foreign State, it shall be lawful for Her Majesty by order in council to direct, and from and after the publication of such order in the *London Gazette*, it shall be and is hereby enacted, That no subject of any such foreign country who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed and deposited with Her Majesty's Secretary of State for the Home Department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland, or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession.

III. *Who this Act shall not apply to.*—This Act shall not apply to any foreigners who may have obtained letters of naturalisation in any part of Her Majesty's dominions.

IV. *When subjects of foreign States shall die in Her Majesty's dominions, and there shall be no persons to administer to their estates, the Consuls of such foreign States may administer.*—Whenever a convention shall be made between Her Majesty and any foreign State, whereby Her Majesty's consuls or vice-consuls in such foreign State shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for Her Majesty by order in council to direct, and from and after the publication of such order in the *London Gazette*, it shall be and is hereby enacted, That whenever any subject of such foreign State shall die within the dominions of Her Majesty, and there shall be no person present at the time of

such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign State within that part of Her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-cousul, or consular agent shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit.

XVI.—*The Titles to Land Consolidation (Scotland) Act*, 31 & 32 *Vict. c.* 101.—[31*st July*, 1868.]

CXVII. *Heritable Securities to form Moveable Estate; except where conceived in favour of Heirs, excluding Executors and* quoad fiscum—*Not to belong to Husband* jure mariti, *nor to Wife* jure relictæ—*Nor to be computed in legitim.*—From and after the commencement of this act no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus*, in the same manner and to the same extent and effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor: Provided always, that where any heritable security is or shall be conceived expressly in favour of such creditor, and his heirs or assignees or successors, excluding executors, the same shall be heritable as regards the succession of such creditor, and shall after the death of such creditor belong to his heirs in the same manner and to the same extent and effect as is the case under the existing law and practice in regard to heritable securities: And provided also, that where a creditor in any existing or future security recorded, or on which an instrument has followed recorded in the register of sasines, shall desire to exclude executors, it shall be competent for him to do so by executing a minute in the form or as nearly as may be in the form of schedule (DD) hereto

annexed, and recording the same in the appropriate register of sasines, and upon such minute being recorded the security to which it refers shall be heritable in the manner and to the extent and effect hereinbefore provided; and further, provided that where in any existing or future security which has not been recorded, or followed by an instrument recorded in the register of sasines, or where in the case of any conveyance or deed of or relating to such security not recorded in the register of sasines, the creditor shall desire to exclude executors, it shall be competent for him to do so by endorsing a minute, in the form or as nearly as may be in the form of schedule (DD) hereto annexed, on the security or on the deed of conveyance thereof in his favour which has not been recorded as aforesaid, and recording the same, along with such security or with such deed or conveyance as the case may be, in the appropriate register of sasines, and upon such security or deed or conveyance, as the case may be, and minute being so recorded the security shall be heritable in the manner and to the extent and effect hereinbefore provided, and, where executors shall be excluded in the security, or by minute recorded as aforesaid, the security shall continue to be heritable as regards the succession of the creditor for the time holding such heritable security, until the exclusion of executors shall be removed, which it shall be lawful for such creditor to do either by executing a minute in the form or as nearly as may be in the form of schedule (EE) hereto annexed, and recording the same in the appropriate register of sasines, whereupon the security shall become moveable as regards the succession of such creditor, as provided by this Act, or by assigning, conveying, or bequeathing such security to himself or to any other person, without expressing or repeating such exclusion, and upon such assignation, conveyance, or bequest taking effect, the security shall become moveable as regards the succession of such creditor or other person, as the case may be, as provided by this Act: And further, provided that all heritable securities shall continue, and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband, *jure mariti*, where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ*, where the same is or shall be conceived in favour of the husband, unless the husband or relict has or shall have right and interest therein otherwise; declaring, nevertheless, that this provision shall in no way prejudice the rights and interests of wife or husband, or of the creditors of either, in or to the bygone interest and annual rents due under any such heritable security and *in bonis* of the hus-

band or wife respectively prior to his or her death; and further provided, that where legitim is claimed on the death of the creditor no heritable security shall to any extent be held to be part of the creditor's moveable estate in computing the amount of the legitim.(*q*)

CLX. *Right to Heirship-Moveables abolished.*—From and after the passing of this Act no heir of line of a party deceased shall be entitled to claim in that character any portion of the moveable estate of such predecessor as heirship-moveables, such claim being hereby abolished.

XVII.—*ACT to amend the Law relating to the Legal Condition of Aliens and British Subjects*, 33 *Vict. c.* 14.—[12*th May*, 1870.]

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STATUS of aliens in the United Kingdom:—

II. Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject: Provided—

(1.) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise.

(2.) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him.

(3.) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition, made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.

(*q*) This section is not retrospective.—*Brown* v. *Macdonald*, 28th Jan. 1870, 8 M. 439.

Securities in a foreign country are to be regarded as heritable or moveable, according to the law of the country in which they are situated.—*Monteith* v. *Monteith*, 28th June, 1882, 19 S. L. R. 740.

The share of an heritable bond falling to the married daughter of an intestate held not to fall under her husband's *jus mariti*.—*Hodge* v. *Hodge*, 22nd Nov. 1879, 17 S. L. R. 137.

III. Where Her Majesty has entered into a convention with any foreign State to the effect that the subjects or citizens of that State who have been naturalised as British subjects may divest themselves of their status as such subjects, it shall be lawful for Her Majesty, by order in council, to declare that such convention has been entered into by Her Majesty; and from and after the date of such order in council, any person being originally a subject or citizen of the State referred to in such order, who has been naturalised as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person shall be regarded as an alien, and as a subject of the State to which he originally belonged as aforesaid.

A declaration of alienage may be made as follows: that is to say,—If the declarant be in the United Kingdom in the presence of any justice of the peace; if elsewhere in Her Majesty's dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being, authorised by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of Her Majesty's dominions, in the presence of any officer in the diplomatic or consular service of Her Majesty.

IV. Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign State a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.

V. From and after the passing of this Act, an alien shall not be entitled to be tried by a jury *de medietate lingue*, but shall be triable in the same manner as if he were a natural-born subject.

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National status of married women and infant children:—

X. The following enactments shall be made with respect to the national status of women and children:—

(1.) A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.

(2.) A widow, being a natural-born British subject, who has become

an alien by or in consequence of her marriage, shall be deemed to be a statutory alien, and may as such at any time during widowhood obtain a certificate of readmission to British nationality in manner provided by this Act.

(3.) Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalised, and has, according to the laws of such country, become naturalised therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject.

(4.) Where the father, or the mother being a widow, has obtained a certificate of readmission to British nationality, every child of such father or mother who, during infancy, has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents.

(5.) Where the father, or the mother being a widow, has obtained a certificate of naturalisation in the United Kingdom, every child of such father or mother, who, during infancy, has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalised British subject.(*qq*)

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XVIII.—*ACT for the Better Apportionment of Rents and other periodical Payments,* 33 & 34 *Vict. c.* 35.—[1*st August,* 1870.](*r*)

WHEREAS rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising, divers statutes have been passed in the eleventh year of the reign of his late Majesty King George the Second, chapter nineteen, and in the session of Parliament holden in the fourth and fifth years of his late Majesty King William the Fourth, chapter twenty-two, and in the session of Parliament held in the sixth and

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(*qq*) Section 18, and the schedule to this Act, repealed by 46 & 47 Vict. c. 39 (1883).

(*r*) This Act is not applicable to the stipend of a parish minister, the division of stipends being regulated by the Act 1672, c. 13, printed *supra.*—*Latta,* 30th Nov. 1877, 15 S. L. R. 168.

seventh years of his late Majesty King William the Fourth, chapter seventy-one, and in the session of Parliament held in the fourteenth and fifteenth years of her present Majesty, chapter twenty-five, and in the session of Parliament held in the twenty-third and twenty-fourth years of her present Majesty, chapter one hundred and fifty-four:

And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. *Short title.*—This Act may be cited for all purposes as "The Apportionment Act, 1870."

II. *Rents and periodical payments shall accrue from day to day, and be apportionable in respect of time.*—From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

III. *Apportioned part of rent, &c., shall be payable when the next entire portion shall have become due.*—The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before.(*s*)

IV. *Persons shall have the same remedies for recovering apportioned parts as for entire portions—Proviso as to rents reserved in certain cases.*—All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for

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(*s*) In a question between the seller and purchaser of an estate on which the rents were forehanded, it was held that the purchaser was entitled to the rents paid at the term prior to the purchase, less only the proportion due from that term to the date of entry.—*Maxwell, &c.* v. *Scott*, 5th Nov. 1873, 11 S. L. R. 57.

Where an entailed estate was forehand rented, and the heir in possession died in July, it was held that his executor was entitled to a proportion of the rents payable at Martinmas corresponding to the period from Whitsunday till the day of his death. —*Heries, &c.*, 7th Feb. 1873, 10 S. L. R. 272.

recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances)(*t*), as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity.(*u*)

V. *Interpretation of terms.*—In the construction of this Act—

The word "rents" includes rent service, rent charge, and rent seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

The word "annuities" includes salaries and pensions.

The word "dividends" includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word "dividend" does not include payments in the nature of a return or reimbursement of capital.

VI. *Act not to apply to policies of assurance.*—Nothing in this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description.

VII. *Nor where stipulation made to the contrary.*—The provisions of this Act shall not extend to any case in which it is or shal be expressly stipulated that no apportionments shall take place.

(*t*) As to "just allowances" in a question between a succeeding heir of entail and testamentary trustees, see *Learmonth, &c.*, 23rd Jan. 1878, 15 S. L. R. 304.

(*u*) The representatives of a person entitled to an annuity "during all the days and years of her life," were held entitled to a proportion of the half-year's annuity current at her death.—*Cunningham's Trustees* v. *Duke*, 18th March, 1873, 11 M 543.

XIX.—*An ACT to amend the Conjugal Rights (Scotland) Amendment Act,* 1861, 37 & 38 *Vict. c.* 31.—[16*th July,* 1874.]

WHEREAS an Act was passed in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, intituled "An Act to amend the Law regarding Conjugal Rights in Scotland": And whereas the expense of procedure under that Act prevents many persons from availing themselves of its benefits, and it is desirable to amend the same: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

I. *Definition of "sheriff."*—The word "sheriff" shall include sheriff-substitute.

II. *Sheriffs' jurisdiction extended to applications for orders to protect property of deserted wives and for the recall of such orders.*—The sheriffs of counties in Scotland shall have all jurisdictions, powers, and authorities necessary for hearing, trying, and determining applications by wives deserted by their husbands for orders to protect property that they have acquired or may acquire by their own industry after such desertion, and property which they have succeeded to or may succeed to or acquire right to after such desertion, against their husbands or creditors of their husbands or any persons claiming in or through the rights of their husbands, and applications by the husbands of such wives, their creditors, or others claiming in or through the rights of such husbands for the recall of such orders: Provided as follows:—

(1.) All such applications in the sheriff-court shall be made by petition in common form, and subject to any orders and regulations which the Court of Session are hereby authorised to make from time to time as to procedure in such applications, the procedure in every such petition, including the procedure in appeals taken therein within the sheriff-court or to the Court of Session, shall, as nearly as may be, be the same as in an ordinary action in the sheriff-court:

(2.) The conditions on which orders to protect property as aforesaid may be granted or recalled in the sheriff-court shall be the same as those on which such orders may be granted or recalled in the Court of Session. The provisions of the recited Act relating to the intimation of interlocutors granting or recalling such orders in the Court of Session shall apply to the intima-

tion of such interlocutors when pronounced in the sheriff-court; and the effects of the grant or recall of any such order duly intimated shall be the same when made in the sheriff-court as when made in the Court of Session:

(3.) An application for the recall of any such order to protect property granted in a sheriff-court shall be competent only when made in the sheriff-court to whose jurisdiction the deserted wife is for the time amenable, or in the Court of Session.

It shall be the duty of the clerk of the court in which any such order was granted, to transmit the process in which it was granted to any other court on receiving written notice from a clerk thereof of the dependence therein of an application for the recall of such order:

(4.) It shall not be necessary to print the petition, answer, or evidence, in order to the disposal by the Court of Session of any appeal taken thereto from a sheriff-court in any application by this Act made competent in the sheriff-court:

(5.) Any warrant of citation granted by a sheriff in any such application may, when necessary, be executed edictally (without the concurrence or authority of the Court of Session), by delivery of a copy thereof at the office of the keeper of edictal citations, according to the mode established by the Act passed in the sixth year of the reign of His Majesty King George the Fourth, chapter 120, in regard to the execution edictally of citations on warrants of the Court of Session, and by an Act of sederunt of the Court of Session, dated the 24th day of December, 1838, and by sending a copy thereof, by post, to the last known address of the person to be cited.

The keeper of edictal citations, or his clerk, shall register an abstract of every such copy so delivered in the record for edictal citations by virtue of letters of supplement, to persons furth of Scotland to appear before any of the inferior courts of Scotland; and such abstract shall exhibit such particulars as are required to be exhibited in an abstract of any copy citation by law appointed to be made or registered by the said keeper or his clerk.

III. *Short title.*—This Act may be cited as "The Conjugal Rights (Scotland) Amendment Act, 1874."

XX.—*The Conveyancing (Scotland) Act*, 1874, 37 & 38 *Vict. c.* 94.—[*7th August*, 1874.]

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IX. *Estates to vest in heirs without service.*—A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act, provided the heir shall be alive at the date of the commencement of this Act, if such person shall have died before that date, and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequences, and be transmissible in the same manner as a personal right to land under an unfeudalised conveyance, according to the existing law and practice.

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XII. *Heir not liable beyond value of estate—May renounce.*—An heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds, and if an heir shall renounce the succession, the creditors of the ancestor shall have the same rights against the estate as upon a renunciation according to the law before the commencement of this Act. When an heir has, before renunciation, intromitted with the ancestor's estate, he shall be liable for the ancestor's debts to the extent of such intromission, but no further.

XIII. *Right of any person to succession as heir may be challenged within twenty years.*—The right of any person to an estate in land by succession as heir acquired after the commencement of this Act may, at any time within twenty years of his infeftment as heir and his entering into possession of such estate, but not thereafter, be challenged by any one who would have been entitled to challenge the decree of service of such person had he expede a service according to the practice existing prior to this Act; and, in the absence of evidence to the contrary, the date of his infeftment shall, for the purpose of this limitation, be assumed to be the date of entering into possession; and such challenge may be made by an action to negative or set aside the alleged right of succession, or to reduce any title expede in virtue of such alleged right.

XIV. *Legal remedies to prevent entry preserved.*—Nothing herein contained shall prejudice or affect the legal remedies of any person having lawful title and interest to prevent any other person from entering into possession of an estate in land as heir, or to remove him from possession, or to obtain sequestration of such estate, or the

appointment of a judicial factor pending the trial of any question regarding the right of succession; and it shall be lawful for the Court of competent jurisdiction to regulate possession pending such trial, as the Court shall see just, notwithstanding the completion, under this Act, of the title of any person as heir.

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XXXVII. *Distinction between heritage and conquest abolished.*—The distinction between fees of heritage and fees of conquest is hereby abolished with respect to all successions opening after the commencement of this Act, and fees of conquest shall descend to the same persons, in the same manner, and subject to the same rules as fees of heritage.(*uu*)

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XXI.—*ACT for the Relief of Widows and Children of Intestates in Scotland where the Personal Estate is of small Value,* 38 & 39 *Vict. c.* 41.—[19*th July,* 1875].(*v*)

WHEREAS many poor persons die intestate in Scotland possessed of personal estate of small amount, and it is desirable to increase the facilities for expeding confirmation to such estate and effects, and to reduce the expense attending the same:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. *Short title.*—This Act may be cited for all purposes as the "Intestates Widows and Children (Scotland) Act, 1875."

II. *Extent of Act.*—This Act shall extend to Scotland only.

III. *Where estate does not exceed* £150, *widow or children may apply to commissary-clerk to fill up inventory and expede confirmation.*(*w*)—Where the whole personal estate and effects of an intestate dying domiciled in Scotland shall not exceed in value the sum of

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(*uu*) The Act 46 & 47 Vict. c. 39 (1883), makes certain amendments on some of the other sections of this Act.

(*v*) By § 35 of 39 & 40 Vict. c. 70 (1876), the commissary-courts are abolished and the whole powers and jurisdictions thereof transferred to the Sheriff.

(*w*) The thirty-fourth section of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), extends the provisions of this section so as to apply to any case where the whole personal estate and effects of a person dying on or after 1st June, 1881, without any deduction for debts or funeral expenses, shall not exceed the value of £300, whoever may be the applicant for representation, and wheresoever the deceased may be domiciled at the time of death.

one hundred and fifty pounds, his widow or any one or more of his children, or in the case of an intestate widow any one or more of her children may apply to the commissary-clerk of the county within which the intestate was domiciled at the time of death; and the said commissary-clerk shall prepare and fill up an inventory and relative oath, as nearly as may be in the form of schedule (A) appended to this Act, and shall take the oath of the applicant thereto, and on caution being found by the applicant according to the practice of the commissary-court, shall proceed to record said inventory and expede confirmation in the form as nearly as may be of schedule (B) annexed to this Act, and shall deliver the same to the applicant without the payment of any fee therefor, save as is provided in schedule (C) annexed to this Act: Provided always, that where the value of the said estate and effects exceeds the sum of one hundred pounds the said inventory shall be duly stamped before being recorded; and such confirmation shall have the same force and effect as that prescribed in schedule (D) annexed to the Act of the twenty-first and twenty-second Victoria, chapter fifty-six; and where such confirmation shall contain English or Irish estate the registrar of any probate-court in England or Ireland shall affix the seal of the said court thereto on the confirmation being sent to him by the commissary-clerk for that purpose, enclosing a fee of two shillings and sixpence.

IV. *Proof of identity and relationship may be required.*—The commissary-clerk of the county may require such proof as he may think sufficient to establish the identity and relationship of the applicant.

V. *Commissary-clerk may refuse to proceed if not satisfied that whole estate not more than* £150.—If the commissary-clerk of the county has reason to believe that the whole personal estate and effects of which the intestate died possessed exceeds in value one hundred and fifty pounds, he shall refuse to proceed with the application until he is satisfied as to the real value thereof.

VI. *Commissary-clerk may administer oath—"Commissary-clerk" to include "commissary-clerk-depute."*—All commissary-clerks shall for the purpose of this Act have power and are hereby authorised to administer oaths and to take declarations and affirmations. The term "commissary-clerk" shall throughout this Act include "commissary-clerk-depute."

VII. *Procedure and fees under this Act to be regulated by Act of Sederunt.*—Any rules and orders and tables of fees requisite for carrying this Act into operation shall be framed and may from time to time be altered by the Court of Session by act of sederunt; but the total amount to be charged to applicants shall not in any case exceed the sums mentioned in the schedule (C) annexed to this Act.

VIII. *Inventory duty not affected by this Act.*—Provided always, that nothing herein contained shall be construed to affect any duty now payable on inventories of personal estate.

SCHEDULE (A).

Form of Inventory and relative Oath.

Inventory of the Personal Estate, wheresoever situated, of [*name and description of deceased*], who died at on the day of 18 .

Scotland.	£	s.	d.
1. Cash in the house, ...			
2. Household furniture and other effects in the deceased's house, . . .			
3. Stock in trade and other effects belonging to deceased, ...			
4. Sum in bank—viz. [*specify it, with interest thereon, to date of oath to Inventory.*]*			
*[*Add any other estate in the usual form.*]			

At , the day of one thousand eight hundred and , in presence of Esquire, commissary-clerk of the commissariot of Appeared [*name and description of applicant*], who, being solemnly sworn and examined, depones, that the said died at upon the day of , and had at the time of his [*or* her] death his [*or* her] ordinary or principal domicile in the county of : That the deponent is the [widow *or* son *or* daughter] of the said deceased , and is desirous to enter upon the possession and management of the deceased's estate as his [*or* her] executor: That the deponent does not know of any testamentary settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part thereof: That the foregoing inventory, signed by the deponent and the said as relative hereto, is a full and complete inventory of the personal estate and effects of the said deceased wheresoever situated and belonging or due to him [*or* her] beneficially at the time of his [*or* her] death, in so far as the same has come to the deponent's knowledge: That the value at this date of the said personal estate and effects, including the proceeds accrued thereon down to this date, does not exceed £150 sterling: That confirmation of the said personal estate in Scotland [England and Ireland, *as the case may be*] is required in favour of the deponent. All which is truth, as the deponent shall answer to God.

SCHEDULE (B).

Form of Confirmation.

Confirmation issued under the Act 38 *&* 39 *Vict. c.* 41.

Confirmation Dative of A. B., who resided at [*name and description of deceased*].

The said A.B. had pertaining and resting owing to at the time of his [*or* her] decease [*take in inventory of estate to be confirmed*].

I, Esquire, commissary of the county of , considering that the said A.B. died at on , and had at the time of death his [*or* her] ordinary or principal domicile in the county of And seeing that C.D., his [widow *or* son *or* daughter, *or* her son *or* daughter] has given up, on oath, an inventory of the personal estate and effects of the said A.B. at the time of death, including the proceeds accrued thereon to date of oath, situated in Scotland [England and Ireland, *as the case may be*], amounting in value to , and has deponed that the whole personal estate and effects of the said A.B. does not exceed in value £150, which inventory, as before written, has been recorded in my court books, of date , and that has [*or* have] likewise found caution for acts and intromissions as executor [*or* executors]. Therefore I, in Her Majesty's name and authority, decern, make, constitute, ordain, and confirm the said C.D. executor [*or* executors] dative *qua* [relict *or* next-of-kin] to the deceased, with full power to to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor dative *qua* is known to belong: Providing always, that shall render just count and reckoning for intromissions therewith, when and where the same shall be legally required.

Given under the seal of office of the commissariot of , and signed by the clerk of court at , the day of one thousand eight hundred and

Commissary-Clerk.

SCHEDULE (C).(*x*)

Where the whole estate and effects of the intestate shall not exceed in value twenty pounds, the sum of five shillings, and where the

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(*x*) By section 34 of this said Customs Act, 1881, it is provided that the fees payable under the section shall not exceed the sum of 15s., inclusive of the fee of 2s. 6d. to be paid to the commissary or sheriff-clerk.

Where the estate and effects shall exceed £100 and be under £300, the stamp duty payable on the inventory shall be 30s. and no more.

whole estate and effects shall exceed in value twenty pounds, the sum of five shillings, and the further sum of one shilling for every ten pounds or fraction of ten pounds by which the value shall exceed twenty pounds.

XXII.—*The Sheriff-Courts (Scotland) Act*, 1876, 39 & 40 *Vict. c.* 70.—[15*th August*, 1876.]

VII.—The Commissary-Courts abolished.

XXXV. *Commissary-courts abolished and powers transferred to sheriffs.*—From and after the commencement of this Act the commissary-courts in Scotland shall be and the same are hereby abolished, and(*a*) the whole powers and jurisdictions of the commissary-court in each commissariot shall be and the same are hereby transferred to the sheriff in office at the commencement of this Act as the commissary of such commissariot, who shall thereafter, and his successors in office as sheriff, possess and exercise the whole of the said powers and jurisdictions in all respects: Provided that it shall still be competent and proper to affix the seal of office of a commissariot to all documents to which it would have been competent and proper to affix the same before the commencement of this Act.

XXXVI. *Office of commissary-clerk in certain cases abolished.*—In every case in which in any sheriffdom the offices of sheriff-clerk and of commissary-clerk shall at the commencement of this Act be united in the same person, who is remunerated by salary for discharging the duties of both offices, the office of commissary-clerk shall be as from the said date and the same is hereby abolished, and the whole powers and duties of the office of commissary-clerk shall be as from the said date and the same are hereby transferred to the office of sheriff-clerk, and the sheriff-clerk shall thereafter, and his successors in office as sheriff-clerk, possess and exercise the whole of the said powers and perform the whole of the said duties.

XXXVII. *Vacancies in office of commissary-clerk not to be supplied.*—No vacancy existing at the commencement of this Act or which may thereafter occur in the office of a commissary-clerk, except the office of the commissary-clerk of Edinburgh, shall be supplied.

XXXVIII. *All commissary-clerks, except in Edinburgh, to be abolished on vacancies occurring.*—In every case of a vacancy occurring after the commencement of this Act in the office of commissary-clerk in any commissariot in Scotland, except the

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(*a*) The preceding words in this section have been repealed by 46 & 47 Vict. c. 39 (1883).

commissariot of Edinburgh, such office shall be, as from the date of the occurrence of such vacancy, abolished, and the whole powers and duties of the office of commissary-clerk shall be transferred to the office of the sheriff-clerk of the county, and the sheriff-clerk of the county shall thereafter, and his successors in office as sheriff-clerk, possess and exercise the whole of the said powers and perform the whole of the said duties.

XXXIX. *Commissary-clerks continuing in office to perform the duties in the sheriff-court.*—From and after the commencement of this Act every commissary-clerk whose office shall not be forthwith abolished under the provisions of this Act, shall perform in the sheriff-court of the county all the duties and exercise all the powers heretofore performed and exercised by him in the commissary-court; provided that such commissary-clerk shall not be disabled from acting as a procurator in the sheriff-court, except in causes in which he acts as clerk of court.

XL. *Provisions to have effect on the abolition of the office of commissary-clerk.*—On the office of commissary-clerk being in any case abolished under the provisions herein before contained, the following provisions shall have effect :—

(1.) All records, books, documents, papers, and things belonging to the office of the commissary-clerk or in the possession of any clerk or officer of that office as such, shall be forthwith transferred to the office or offices of the sheriff-clerk of the county.

(2.) It shall be lawful for the Lords Commissioners of Her Majesty's Treasury to regulate the office of such sheriff-clerk, and out of moneys to be voted by Parliament to award him such salary or personal remuneration, together with such allowances for clerks and office expenses, as shall seem just, having regard to the additional duties imposed upon him, and to the increased expenses of his office consequent on the transfer thereto of the duties of the office of commissary-clerk.

(3.) The sheriff-clerk shall account for and pay to the Queen's and Lord Treasurer's Remembrancer on behalf of Her Majesty all fees received in his office in connection with the new business by this Act transferred to his office.

VIII.—Amendment of Law as to Confirmation of Executors.

XLI. *Note in confirmation by sheriff-clerk or commissary-clerk that deceased died domiciled in Scotland substituted for certified copy interlocutor by the sheriff-commissary, and to have like effect.*—Where

under the provisions of the ninth and subsequent sections of the Act passed in the twenty-first and twenty-second years of the reign of Her present Majesty, chapter fifty-six, intituled "An Act to amend the law relating to the confirmation of executors in Scotland, and to extend over all parts of the United Kingdom the effect of such confirmation and of grants of probate and administration," it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland, personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland. That fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the sheriff-clerk to insert in the confirmation or to note thereon and sign a statement that the deceased died domiciled in Scotland; and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland(*a*); and sections twelve and thirteen of the said Act, so far as they make it a condition of the sealing of a confirmation in the principal Court of Probate in England or in the Court of Probate in Dublin, that the copy of the confirmation provided to be deposited with the registrar shall be accompanied by such a certified copy interlocutor, are hereby repealed.

XLII. *Extension of the provisions of sections* 12 *and* 13 *of* 21 *&* 22 *Vict. c.* 56.—When an additional inventory has been given in and recorded and confirmation granted in a sheriff-court in Scotland of estate situated in England or Ireland of a person who died domiciled in Scotland, and the additional confirmation shall be produced in the principal Court of Probate in England, or in the Court of Probate in Dublin, as the case may be, and a copy thereof deposited with the registrar of the court, such additional confirmation shall be sealed with the seal of the court and returned to the person producing the same, and that whether the original confirmation shall have been sealed with the seal of the court or not, and although the additional inventory confirmed shall not contain any estate of the deceased situated in Scotland, and such additional confirmation when so sealed shall thereafter have the same force and effect as if probate or letters of administration, as the case may be, had been granted by the court of probate in which it had been sealed.

XLIII. *Confirmation of Scotch estate with note of trust funds in England or Ireland to be sealed in Probate Courts as if it contained*

(*a*) The words which follow this in this section have been repealed by 46 & 47 Vict. c. 39, 1883.

English or Irish estate of the deceased.—When any confirmation or additional confirmation of personal estate situated in Scotland, which shall contain or have appended thereto and signed by the sheriff-clerk a note or statement of funds in England or Ireland, or both, held by the deceased in trust, shall be produced in the principal Court of Probate in England, or in the Court of Probate in Dublin, as the case may be, such confirmation shall be sealed with the seal of such court in the same manner as is provided by sections twelve and thirteen of the Act passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, as amended by this Act, with respect to sealing confirmations which include personal estate situated in England or Ireland respectively; and such confirmation shall thereafter have the like force and effect in England and Ireland with respect to such funds as if probate or letters of administration, as the case may be, had been granted by the Court of Probate in which it had been sealed; and such note or statement may be inserted or appended as aforesaid by the sheriff-clerk, provided the same shall have been set forth in any inventory which has been recorded in the books of the court of which he is clerk.(*y*)

XLIV. *Schedule (C) of* 21 *&* 22 *Vict. c.* 56, *hereby repealed, and new form of intimation, &c.*—The sheriff-clerk shall, after a petition for the appointment of an executor has been intimated by him as provided by section four of the Act passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, and after receiving the certified copy of the printed and published particulars therein set forth, forthwith certify these facts on the petition in the following or similar terms: "Intimated and published in terms of the statute," which certificate (in lieu of the certificate in the form of schedule (C) annexed to the said Act, which schedule (C) is hereby repealed)(*z*), shall be dated and signed by him, and shall be sufficient evidence of the facts therein set forth: Provided always, that special intimation shall be made to all executors already decerned or confirmed to a deceased person of any subsequent petition for the appointment of an executor which may be presented with reference to the personal estate of the same deceased person.

XLV. *A Calendar of confirmations and inventories to be published annually.*—It shall be the duty of the commissary-clerk of Edinburgh,

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(*y*) See § 233 *supra*, as to the practice in sealing in England of Scotch confirmations.

(*z*) The words "which schedule (C) is hereby repealed" have been repealed by 46 & 47 Vict. c. 39, 1883.

on or before the thirty-first day of December, one thousand eight hundred and seventy-seven, and on or before the thirty-first day of December in every year thereafter, to prepare and issue a printed calendar containing a list or register, alphabetically arranged, of all confirmations granted, and of all inventories given in, in cases in which from any cause confirmation shall not have been required in Scotland, in the year ending on the thirty-first day of December immediately preceding, specifying in each case the name and designation, and the place and date of death of the person deceased; whether he died testate or intestate; the names and designations of his executors; date of confirmation or recording of inventory; the date of the will or deed, if any; and where and of what date the same was registered; and the value of the estate: Provided as follows:—

(1.) It shall be the duty of every sheriff-clerk to furnish to the commissary-clerk of Edinburgh, on or before the fifteenth day of February, one thousand eight hundred and seventy-seven, such a list or register of confirmations granted, and inventories given in, within the sheriffdom of which he is such clerk (with all the particulars above specified), in the year ending on the thirty-first day of December immediately preceding; and thereafter quarterly, on or before the first days of February, May, August, and November in each year, to furnish to the commissary-clerk of Edinburgh such a list or register, with such particulars as aforesaid, of all confirmations and inventories granted, or given in, within such sheriffdom in the quarters ending on the thirty-first day of December, the thirty-first day of March, the thirtieth day of June, and the thirtieth day of September immediately preceding respectively.

(2.) A copy of every such calendar issued shall be sent by the commissary-clerk of Edinburgh to every sheriff-clerk in Scotland, who shall keep the same in his office open for the inspection of the public on payment of such fee as may be fixed by Act of Sederunt, which the Court of Session are hereby authorised and required to pass:

(3.) A copy of every issue of such calendar shall also be sent to the Lord Clerk Register and to the registrars in the Probate Courts of London and Dublin:

(4.) The cost of preparing and printing and issuing such calendar, and of furnishing copies thereof to the persons to whom they are herein directed to be sent, shall be defrayed out of moneys to be voted by Parliament.

XXIII.—*ACT for the Protection of the Property of Married Women in Scotland,* 40 & 41 *Vict. c.* 29.—[2*nd August,* 1877.]

WHEREAS it is just and expedient to protect to the extent hereinafter provided for the property of married women in Scotland: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. *Commencement of Act.*—This Act shall commence and take effect from and after the first day of January, one thousand eight hundred and seventy-eight.

II. *Extent of Act.*—This Act shall extend to Scotland only.

III. *Protection of earnings of married women.*—The *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of this Act, in any employment, occupation or trade in which she is engaged, or in any business which she carries on under her own name, and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money or property, and all investments thereof, shall be deemed to be settled to her sole and separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof.(*a*)

(*a*) This section is substantially the same as § 1 of the English Act, 33 & 34 Vict. c. 93 (9th August, 1870), which is as follows:—"The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and be taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property."

This English Act of 1870 was repealed by the subsequent Act of 1882 (44 & 45 Vict. c. 75), but the above quoted provision was in substance re-enacted by the second section of the latter Act, which Act is quoted below, p. 399.

Funds belonging to a wife exclusive of her husband's *jus mariti* and right of administration may be invested by her in trade, and she may thereby incur personal obligations which will be effectual against her separate estate, but not against her husband. But a personal obligation by her unconnected with her separate estate will not bind her.—*Biggart*, 15th Jan. 1879, 6 R. 470; *Forbes*, 28th June, 1879, 6 R. 1122.

Where a married woman trades in her own name with her husband's funds, and with his consent, the husband and not the wife is bound by her contract.—*Carmichael*, 31st Oct. 1879, 7 R. 118.

IV. *Liability of husband for wife's antenuptial debts*(*b*) *limited to amount of property received through her.*—In any marriage which takes place after the commencement of this Act, the liability of the husband for the antenuptial debts of his wife shall be limited to the value of any property which he shall have received from, through, or in right of his wife at, or before, or subsequent to the marriage, and any court in which a husband shall be sued for such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of such property.(*c*)

V. *Savings*—24 *&* 25 *Vict. c.* 86; 37 *&* 38 *Vict. c.* 31.—This Act shall not affect the rights conferred upon a married woman by the "Conjugal Rights (Scotland) Amendment Act, 1861," or the "Conjugal Rights (Scotland) Amendment Act, 1874."

VI. *Short title.*—This Act may be cited as "The Married Women's Property (Scotland) Act, 1877."

XXIV.—*ACT to extend to Scotland the Facilities for effecting Policies of Assurance for the Benefit of Married Women and Children now in force in England and Ireland,* 43 *&* 44 *Vict. c.* 26.—[26*th August,* 1880.]

WHEREAS by the Married Women's Property Act, 1870 [33 & 34 Vict. c. 93], increased facilities are given for effecting policies of assurance for the benefit of married women and children in England and Ireland:

And whereas it is expedient that such increased facilities for effecting policies of assurance for the benefit of married women and children should be extended to Scotland:

(*b*) Question as to meaning within the Act of an "antenuptial debt,"—no marriage contract. Husband's liability held limited to the amount of property brought to him by the wife.—*James Wishart, &c.*, 14th March, 1879, 16 S. L. R. 453.

(*c*) In the English Act of 1870 (§ 12), a husband was not "liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried." The English Act of 1882, whilst repealing (§ 22) the Act of 1870, expressly provides (§§ 13 and 14) that a husband shall be liable for his wife's antenuptial contracts or torts to the extent of any property which he has acquired or become entitled to through her. But the wife is liable to make good to him out of her separate estate any payments he may make in satisfaction of her debts. See Act printed below, p. 399.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. *Married woman may effect policy of assurance for her separate use.*—A married woman may effect a policy of assurance, on her own life or on the life of her husband, for her separate use; and the same and all benefit thereof, if expressed to be for her separate use, shall, immediately on being so effected, vest in her, and shall be payable to her, and her heirs, executors, and assignees, excluding the *jus mariti* and right of administration of her husband, and shall be assignable by her either *inter vivos* or *mortis causa* without consent of her husband; and the contract in such policy shall be as valid and effectual as if made with an unmarried woman.

II. *Policy of assurance may be effected in trust for wife and children.*—A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency; and the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office: Provided always, that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.(*d*)

(*d*) This section is substantially the same as section 10 of the English Married Women's Property Act, 1870, which Act being repealed by section 22 of 45 & 46 Vict. c. 75, the provision was re-enacted in another form by section 11 of the latter Act. The latter Act is printed *infra*.

The law as to the rights of spouses under policies of assurance, prior to the passing of this Act, was fully discussed in the cases of *Smith* v. *Kerr*, 7 Macph. 863; *Muirhead*, 6 Macph. 95; *Wight* v. *Brown*, 11 D. 459; *Thomson's Trs.* v. *Thomson*, 9th July, 1879, 7 R. 1228.

III. *Application and short title of Act.*—This Act shall apply only to Scotland, and may be cited as the Married Women's Policies of Assurance (Scotland) Act, 1880.

XXV.—*ACT for the Amendment of the Law regarding Property of Married Women in Scotland.*(a)—[44 & 45 *Vict. c.* 21, 18*th July,* 1881.]

WHEREAS an Act was passed in the fortieth year of the reign of Her present Majesty, entitled the Married Women's Property (Scotland)

(a) This is a singularly involved Act. It has been aptly characterised by an eminent judge as "a startling and anomalous piece of legislation."—*Poë* v. *Paterson*, 3rd Dec. 1882, 20 S. L. R. 252). Its object, as stated in the preamble, is "to *protect* to the *further extent*" therein specified, "the property of married women in Scotland," saving always marriage-contracts, whether executed before or during marriage, as also the law relating to such contracts, and to donations between married persons, to a wife's non-liability to personal diligence, and the rights of married women under the Married Women's Property Act, 1877. It does not repeal the Conjugal Rights Acts, or the Married Women's Policies of Assurance Act, previously passed, so that these Acts (printed above) are to be read along with this Act; but, in the case of a conflict (see 13 Vict. c. 21), the later Act must prevail. It is this fact, coupled with the general and indefinite, if not somewhat ambiguous terms of the present Act, that creates the difficulty of a ready and clear understanding of the present law affecting the property of married women.

The provisions of the present Act, which came into operation on 18th July, 1881, may be briefly summed thus :—

§§ 1 and 2 have reference to marriages contracted *after* 18th July, 1881; where the husband at the time of the marriage had his domicile in Scotland.

§§ 3 and 4 have reference to marriages contracted *before* that date, irrespective of the husband's domicile at the time of the marriage.

§§ 5, 6, 7, and 8 are applicable to *all* marriages, irrespective of the time of contraction.

The effect of the Act may be broadly stated as follows :—

§ 1 practically abolishes the husband's *jus mariti*, and secures a married woman in the possession of her separate personal estate, but restrains her from assigning the prospective income thereof, or disposing of such estate, other than accruing income, without the husband's consent.

§ 2 abolishes the husband's *jus mariti* and right of administration as regards the rents and produce of heritable property in Scotland belonging to the wife.

§ 3 excludes the operation of the Act where the husband by irrevocable deed has made a reasonable provision for his wife in case of her surviving him; and in other cases, excludes the husband's *jus mariti* and right of administration as to all property coming to the wife after 18th July, 1881.

§ 4 enables persons married *before* 18th July, 1881, to come under its provisions by mutual deed to be registered and publicly advertised.

§ 5 enables a wife, deserted by her husband or living apart from him with his consent, to take legal measures towards executing deeds without her husband's consent.

Act [40 & 41 Vict. c. 29](*b*), and it is just and expedient to protect, to the further extent hereinafter provided for, the property of married women in Scotland(*c*):

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. (1.) *Wife married after date of Act to have separate estate in moveables.*—Where a marriage is contracted *after* the passing of this Act(*d*), and the husband shall, at the time of the marriage, have his *domicile* in Scotland(*e*), the *whole* moveable or personal estate(*f*) of the wife, whether acquired before or during the marriage, shall, by

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§§ 6 and 7 give the husband and children of a woman dying domiciled in Scotland, indefeasible rights in her personal succession, similar to the rights of *jus relictæ* and *legitim*, which a widow and children have in the personal estate of a husband and father at his death.

§ 8 exempts antenuptial, postnuptial, and other contracts from the operation of the Act.

§§ 5, 6, 7, and 8 are substantive and independent enactments, not intended to be restricted in their application, but to extend to all marriages whether contracted *before* or *after* the Act.

(*b*) This Act printed above.

(*c*) This preamble does not cover the whole provisions of the Act.

(*d*) 18th July, 1881.

(*e*) The law of domicile is explained in §§ 82, 219 *supra*. This section does not come into operation except where the husband is domiciled in Scotland *at the time* of the marriage. Consequently it does not apply to *all* marriages that may be contracted in Scotland *after* the date of the Act. For example, a foreigner, or a man not domiciled in Scotland, may contract marriage in Scotland with a domiciled Scotchwoman without being affected by this section, nor would it make any difference if immediately after the marriage the husband took up his residence in Scotland *animo manendi*, and lived in Scotland every day of his married life, or indeed lived in Scotland every day of his existence, except during the time necessary to acquire a domicile elsewhere previous to the date of his marriage. In either case, the husband would not, under Section 1, lose his *jus mariti* (which, as already stated, comes into existence on the solemnisation of the marriage, § 90 *supra*) to any extent, but (in the words of the Act) it would extend over "the whole moveable or personal estate of the wife, whether acquired before or during the marriage," in so far as not excluded otherwise than by this section. In the case, therefore, of a husband not domiciled in Scotland at the time of his marriage, this section creates no separate moveable estate which would be subject to division on the wife's death under Sections 6 and 7 of the Act, except to the extent provided by Section 2 of the Act as regards "the rents and produce of heritable property in Scotland belonging to the wife," which rents are declared "to be no longer subject to the *jus mariti* and right of administration of the husband." This latter section does not state that it is to take effect only where the domicile of the husband at the time of the marriage is in Scotland, or that the marriage must be contracted in Scotland at all.

(*f*) As to what is comprehended under "moveable or personal estate" see § 83 *supra*.

operation of law, be vested(*g*) in the wife as her separate estate(*h*), and shall not be subject to the *jus mariti*.(*i*)

(2.) *Income.*—Any income of such estate shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration(*k*) shall be excluded; but the wife shall not be entitled to assign the prospective income thereof(*l*), or, unless with the husband's consent, to dispose of such estate.(*m*)

(*g*) As to the operation of the law of vesting, see § 80 *supra*.

(*h*) "Separate estate" as used here does not mean that the wife's personal property shall be at her own absolute disposal. As will be afterwards seen, it practically means that the separate estate shall not fall into the hands of the husband or his creditors. Nor does the term include the whole of the wife's moveable or personal estate. Section 8 of the Act expressly exempts from its operation the rights of married women under The Married Women's Property Act, 1877, which excludes the husband's right of administration, as well as his *jus mariti*, from the wages and earnings of married women gained in any trade, employment, or business, and all investments thereof. Such wages and earnings, therefore, and their accumulations, do not fall under the provisions of this Act, but under the provisions of The Married Women's Property Act, 1877. Moreover, the provisions of the Conjugal Rights Act and the Married Women Policies of Insurance Act (printed *supra*) remain unaffected by this Act. Consequently, a married woman may possess other "separate estate" of a personal nature, with which she may deal as if she were unmarried. She is, for instance, entitled to claim out of property she may acquire by donation, bequest, succession, or any other means than by her own industry (means acquired by her own industry being, as already noticed, provided for by the Married Women's Property Act, 1877), a "reasonable provision" for herself, to be held by her exclusive not only of the *jus mariti* but of the right of administration of her husband. She may also effect an insurance on the life of herself or of her husband for "her separate use," to be held by her in the same uncontrolled manner, and to be assignable by her either *inter vivos* or *mortis causa* without the consent of her husband. She may further, if deserted by her husband, or judicially separated from him, secure by legal measures any property she may, after such separation or desertion, acquire by her own industry or succession, to be held by her as if unmarried. These results may also be obtained irrespective of the husband's domicile at the time of the marriage. This section has also to be read along with Subsection 5 of Section 1 and Section 8 of the Act, which exclude from the operation of the Act antenuptial, postnuptial, and other contracts, as well as certain rights of married women; and under all or any of these, therefore, a married woman may possess other "separate estates" more or less under her personal control.

(*i*) The *jus mariti* and how it operates are explained in § 90 *supra*.

(*k*) The right of administration is explained in § 90 *supra*. See also *Bryce's Trs.* 2nd Feb. 1878, 5 R. 722, where the distinction between the *jus mariti* and right of administration is explained.

(*l*) The wife is excluded from assigning the prospective income from the personal property specified in Subsection 1 of Section 1; but, as stated in note (*h*), the wife may be possessed of other property which is not touched by this section.

(*m*) This provision renders the wife incapable of disposing of the personal property specified in the preceding subsection. As regards such property the husband's *jus mariti* is entirely excluded, but his right of administration is excluded only as regards income, and even as regards that, the exclusion is qualified to the extent only of enabling the wife to uplift the income on her own receipt; she is expressly debarred from assigning it prospectively. She is further restrained from assigning or disposing of any part of the capital of her separate estate without her husband's consent *whilst*

(3.) *Liability to arrestment.*—Except as hereinafter provided(*n*), the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables(*o*) as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband.

(4.) *Bankruptcy.*—Any money, or other estate of the wife, lent or entrusted to the husband(*p*), or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate *after* but *not before* the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

(5.) *Contracts of marriage.*(*q*)—Nothing herein contained shall exclude or abridge the power of settlement by antenuptial contract of marriage.

II. *Rents of heritable property to be separate estate in wife.*—Where a marriage is contracted after the passing of this Act, the rents and

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living with him. If she is deserted by him, or *living apart* from him *with his consent* (§ 5), she may obtain the authority of the Court to dispense with his consent to any deed relating to her estate, but not otherwise. Practically, therefore, the provisions in this section place the capital of a wife's moveable estate in a position somewhat similar to what the older law placed her paraphernalia—that is, the rights of the husband and his creditors being absolutely excluded; but, on the other hand, the wife had not the power of either disposing of, or pledging the paraphernalia without the husband's consent. As a necessary result of this it would seem that the rents and produce of a wife's heritable estate, as well as the annual income of her moveable estate, as the same become due, may be lawfully attached for her debts and deeds, but that no part of the capital or prospective income of her moveable estate may be so attached, even for the wife's own debts or deeds, any more than her paraphernalia could have been attached for her debts or deeds, or pledged by her without her husband's consent. As a husband upon the death of his wife has now a legal right to a share of her separate moveable estate, equal to her right of *jus relictæ* in his estate in the event of his death, it is obvious that the husband's consent may be withheld to his own ultimate advantage. Moreover, as the wages and earnings of a married woman, and all investments and accumulations thereof fall, as already stated, under The Married Women's Property Act, 1877, the provisions of that Act, and not the provisions of the Act of 1881, apply thereto. It is of course always open (§ 8) to husband and wife to contract themselves out of the present Act.

(*n*) Subsection 4.

(*o*) See § 83 *supra*, as to what is comprehended under term "corporeal moveables."

(*p*) The 3rd section of The English Married Women's Property Act, 1882 (the Act is printed *infra*) is substantially the same as this section. The object is to prevent the husband in the case of his bankruptcy maintaining that the capital employed in his business, though really his own, belonged to his wife, and that she is either a secured or unsecured creditor for the amount.

(*q*) This clause seems unnecessary and meaningless, as Section 8 covers the whole of the Act as regards contracts made between persons either before or during marriage.

produce of heritable property(*r*) in Scotland belonging to the wife shall no longer be subject to the *jus mariti* and right of administration of the husband.(*s*)

III. *How far Act to apply to marriages contracted before its passing.*—In the case of marriages which have taken place before the passing of this Act—

(1.) The provisions of this Act(*t*) shall not apply where the husband shall have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision(*u*) for his wife in the event of her surviving him :

(2.) In other cases(*v*) the provisions of this Act shall not apply except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act.

IV. *In case of marriages contracted before Act, parties may come under its provisions by deed*(*w*).—It shall be competent to all persons

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(*r*) Heritable property described in § 235 *supra*.

(*s*) This section applies to the income from heritable property situated in Scotland only, belonging to a wife married (not necessarily in Scotland) after 18th July, 1881. As already explained (note (*h*)), the rents and produce from a wife's heritable property become, as they fall due, her own absolute property, to be disposed of by her along with the income under Subsection 2 of Section 1 as she thinks proper, and do not form part of the moveable or personal estate under Sub-section 1 of Section 1, which cannot be assigned or disposed of by her without the husband's consent.

(*t*) "The provisions of this Act" held to refer only to the provisions which precede the section.—*Poë* v. *Paterson*, *supra*, affirmed (H. L.) 16th July, 1883, 21 S. L. R. 48.

(*u*) As to what is considered "a reasonable provision," see cases cited under Conjugal Rights Acts, *supra*. It would seem that under this section the simple matter for inquiry by the Court would be whether the provisions under an irrevocable deed were or were not "reasonable provisions." According as the answer was affirmative or negative, the provisions of the Act would or would not apply. No provision is here made for the Court making up the provision to such a sum as will fall within the term "reasonable," as is provided by § 16 of The Conjugal Rights Act, 1861, with regard to the property there dealt with.

(*v*) This Subsection is somewhat involved, but means that where the wife has not been secured in a reasonable provision by an irrevocable deed, the preceding provisions of the Act shall apply to and affect all property the wife may acquire *after* 18th July, 1881. It leaves unaffected the provisions of the Conjugal Rights Act, 1861, under which the wife may obtain from the Court an order for the protection of property she may acquire by her own industry, or by succession, to the effect of rendering her independent as regards such property; nor does it affect the provisions of the Married Women's Property Act, 1877, or the Policies of Assurance Act, 1880.

(*w*) This section might not inappropriately have formed a Subsection of Section 3. Subsection 1 of Section 3 provides for *one* of the cases,—the case of an irrevocable provision to the wife made by deed executed before 18th July, 1881 ; and Subsection 2 provides for the *other* cases before mentioned, *but only* as regards *acquirenda*. Section 4, again, enables persons married before 18th July, 1881, to come under the provisions of the Act by deed as regards property acquired *prior*, as well as *subsequent* to that date.

married before the passing of this Act to declare by mutual deed that the wife's whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by this Act, and upon such deed being registered in the register of deeds at Edinburgh, or in the Sheriff-Court register of the county or counties(*x*) in which the parties reside, and being advertised in terms of the schedule in *The Edinburgh Gazette* and three times in two local newspapers circulating in such county or counties, the said estate shall be vested in her as hereinbefore provided, and subject to the provisions of this Act; provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband; but no such deed shall be of any effect as against any debt or obligation contracted by the husband prior to the date of the deed being so advertised and registered.(*y*)

V. *Husband's consent dispensed with in certain cases.*—Where a wife is deserted by her husband, or is living apart from him with his consent, a judge of the Court of Session or Sheriff-Court, on petition addressed to the court, may dispense with the husband's consent to any deed relating to her estate.(*a*)

VI. *Right given to husband in wife's moveable succession.*—After the passing of this Act(*b*) the husband of any woman who may die domiciled in Scotland(*c*) shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate(*cc*), according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be.

VII. *Children of women dying domiciled in Scotland to have right of legitim, &c.*(*d*)—After the passing of this Act the children of

(*x*) The domicile of the wife follows that of the husband (*Carswell* v. *Carswell*, 6th July, 1881, 8 R. 901) except where parties are judicially separated when the provisions of the Conjugal Rights Acts (*supra*) come into operation. A husband and wife, however, executing "a mutual deed," are not likely to reside in different counties.

(*y*) This section enables persons married *before* the passing of the Act to contract themselves *under* its provisions, saving the rights of prior creditors; but Section 8 enables them to contract themselves *out* of its provisions without special reference to such rights.

(*a*) The husband's consent was dispensed with under this section, on the ground of his desertion, although the wife at the time was living in adultery.—*Niven*, 19th May, 1882, 20, S.L.R. 587. This section falls to be read with Section 1 of the Conjugal Rights Act, 1861. An order of protection under that Act has the effect of enabling a woman to deal with her property as if unmarried.

(*b*) This section applies to marriages contracted *before* as well as *after* the date of the Act, irrespective of the place of contraction.—*Poë* v. *Paterson*, *supra*.

(*c*) See note (*x*) *supra*. (*cc*) See note (*h*) *supra*. (*d*) See note (*x*) *supra*.

any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate(*dd*) which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be.

VIII. *Exempting contracts and certain legal rights from operation of Act.*—This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons(*e*), or to a wife's non-liability to diligence against her person(*f*), or any of the rights of married women under the recited Act.

(*dd*) See note (*h*) *supra*.

(*e*) Donations made by one spouse to the other, though effectual, are liable to be revoked by the donor at any time of his or her life, even after dissolution of the marriage, and this applies to all deeds whether executed by the spouses directly in the form of donations, or indirectly in the form of mutual contracts or other deeds if they import gratuitous gifts by the one spouse to the other. The deeds revocable are only those that are gratuitous or granted without equivalent consideration. Gratuitous deeds are, however, effectual if not revoked. Gifts between intending spouses are not affected by this rule (Ersk. 1, 6, 29).

(*f*) As a general rule, a wife is at common law deemed incapable of granting any personal obligation enforceable against either herself or her separate estate. But to this rule there are the following exceptions: (1) A personal obligation for money applied for the wife's own benefit may warrant diligence against her separate estate, but not against her person; (2) Where the husband is abroad, insane, outlawed, or imprisoned for a term of years, his wife may bind herself by personal obligation (Bell's Prin. § 1612); (3) Where a wife has obtained decree of judicial separation, or a protection order under the Conjugal Rights Acts (printed *supra*), or where the husband's *jus mariti* and right of administration are both excluded, she is capable of entering into obligations, and of suing and being sued as if she were unmarried. A wife cannot grant a bill even for necessaries supplied to her, but she will be liable on a bill granted by her where she fraudulently represents herself as unmarried. In England married women are not in this position. There married women are now placed exactly on the same footing as single women as regards the acquiring, holding, and disposing of their own property, and of suing and being sued. They are in fact rendered perfectly independent of marital control and interference. This state of matters was brought about by the 45 & 46 Vict. c. 75, entituled "An Act to consolidate and amend the Acts relating to the Property of Married Women." Although that Act does not extend to Scotland, we shall here reproduce it, as a comparison of its provisions with the above Act may be useful. It was passed on 18th August, 1882, and provides as follows:—

"Whereas it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled 'The Married Women's Property Act, 1870,' and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled 'An Act to amend the Married Women's Property Act (1870)':

"Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

IX. *Short title.*—This Act may be cited as the Married Women's Property (Scotland) Act, 1881.

"1. *Married Woman to be capable of holding Property and of contracting as a feme sole.*—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee. (2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. (3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown. (4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire. (5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

"2. *Property of a Woman married after the Act to be held by her as a feme sole.*—Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

"3. *Loans by Wife to Husband.*—Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

"4. *Execution of General Power.*—The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

"5. *Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.*—Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

"6. *As to Stock, &c., to which a Married Woman is entitled.*—All deposits in any post-office or other savings-bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt, or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole

SCHEDULE.

Form of Notice prescribed by Section IV.

Notice is hereby given that on the day of a deed by A. B. of C. [*designation*] and E. F. his wife has been registered in

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name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

"7. *As to Stock, &c., to be transferred, &c., to a Married Woman.*—All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

"Provided always, that nothing in this Act shall require or authorise any corporation or joint-stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

"8. *Investments in joint names of Married Women and others.*—All the provisions hereinbefore contained as to deposits in any post-office or other savings-bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

the register of in terms of the Married Women's Property (Scotland) Act, 1881.

"9. *As to Stock, &c., standing in the joint names of a Married Woman and others.*—It shall not be necessary for the husband of any married woman, in respect of her interests, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

"10. *Fraudulent Investments with Money of Husband.*—If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under Section Seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any money so deposited or invested may be followed as if this Act had not passed.

"11. *Moneys payable under Policy of Assurance not to form part of Estate of the Insured.*—A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

"A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

XXVI.—*ACT to amend the Law as regards the Presumption of Life in Persons long absent from Scotland.*—[44 & 45 *Vict. c.* 47, 22*nd August,* 1881.]

WHEREAS great hardships have arisen from the want of any limitation to the presumption of life as regards persons who have been

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"12. *Remedies of Married Women for Protection and Security of Separate Property.*—Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

"13. *Wife's Antenuptial Debts and Liabilities.*—A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

"14. *Husband to be liable for his Wife's Debts contracted before Marriage to a certain extent.*—A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be

absent from Scotland, or have disappeared for long periods of years,(*a*) and it is desirable that a limitation should be provided:

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sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

"15. *Suits for Antenuptial Liabilities.*—A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plantiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

"16. *Act of Wife liable to Criminal Proceedings.*—A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

"17. *Questions between Husband and Wife as to Property to be decided in a summary way.*—In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute), in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be), may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the same court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of *certiorari* or otherwise as may be

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(*a*) The Act does not apply to the case of the disappearance of a person who had never been in Scotland.—Petition, *Rainham, &c.*, 2nd December, 1881, 19 S. L. R. 167.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and

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prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

"18. *Married Woman as an Executrix or Trustee.*—A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

"19. *Saving of existing Settlements, and the Power to make future Settlements.*—Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

"20. *Married Woman to be liable to the Parish for the Maintenance of her Husband.*—Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

"21. *Married Woman to be liable to the Parish for the Maintenance of her Children.*—A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children and grandchildren.

"22. *Repeal of* 33 & 34 *Vict. c.* 93; 37 & 38 *Vict. c.* 50.—The Married Women's Property Act, 1870; and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any

Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

I. *Presumption of life limited to seven years as regards income.*—In the case of any person who has been absent from Scotland, or who has disappeared for a period of seven years or upwards, and who has not been heard of for seven years, and who at the time of his leaving or disappearance was possessed of or entitled to heritable or moveable estate in Scotland, or who has become entitled to such estate in Scotland, it shall be competent to any person entitled to succeed to an absent person in such estate to present a petition to the Court setting forth the said facts, and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to uplift and enjoy the yearly income of the heritable or moveable estate of such absent person, as the case may be, and to grant all requisite discharges for the same, as if the said absent person were dead; or the Court may sequestrate the estate, and appoint a judicial factor thereon with the usual powers, and with authority to pay over the free yearly income of the estate to the petitioner, whose discharge shall be as valid and effectual as if granted by the absent person.(*b*)

II. *Provision for disposal of capital of moveable estate seven years*

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husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

"23. *Legal Representative of Married Women.*—For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

"24. *Interpretation of Terms.*—The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word 'property' in this Act includes a thing in action.

"25. *Commencement of Act.*—The date of the commencement of this Act shall be the first of January One thousand eight hundred and eighty-three.

"26. *Extent of Act.*—This Act shall not extend to Scotland.

"27. *Short Title.*—This Act may be cited as the Married Women's Property Act, 1882."

(*b*) Where a person presumed to be dead was a liferenter, it was held that the fiar, not being "entitled to succeed" to such person, was not entitled to obtain the annual income of the estate.—*Peterhead School Board*, 10th March, 1883, 20 S. L. R. 497.

after date of deliverance.—It shall be competent to the petitioner upon whose petition a deliverance has been granted in terms of the preceding section, authorising him to uplift and enjoy the yearly income of moveable estate, or to the heir or representative of such petitioner, to present another petition to the Court after the lapse of seven years from the date of said deliverance, setting forth that during that further period the said absent person has not been heard of, and after proof of the facts stated in the petition, and such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to, and thereupon to receive and discharge, possess and enjoy, the fee or capital of the said moveable estate of the said absent person in the same manner as if the said absent person were dead.(*c*)

III. *Provision for disposal of heritable estate thirteen years after date of deliverance.*—It shall be competent to the petitioner or petitioners upon whose petition a deliverance has been granted in terms of § 1, authorising him to uplift and enjoy the yearly income of heritable estate, or to the heir or representative of such petitioner, to present another petition to the Court after a lapse of thirteen years from the date of said deliverance, setting forth that during that further period the said absent person has not been heard of, and after proof of the facts stated in the petition, and such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to and enter into possession and enjoyment of the fee of the said heritable estate of the said absent person in the same manner as if the said absent person were dead.

IV. *Provision for disposal of moveable estate after fourteen years' absence where no previous deliverance relative to income under* § 1.—In the case of any person who has been absent from Scotland, or who has disappeared for a period of fourteen years or upwards, and who has not been heard of for fourteen years, and who at the time of his leaving or disappearance was possessed of or entitled to moveable estate in Scotland, or who has since become entitled to moveable estate there, it shall be competent to any person entitled to succeed to the said absent person in such moveable estate to present a petition to the Court setting forth the said facts, and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to

(*c*) The expense of a petition for the sequestration of the estate of an absentee not allowed out of the capital of the estate.—*Dougall*, 25th November, 1882, 20 S. L. R. 164.

make up a title to, receive and discharge, possess and enjoy, sell or dispose of the said moveable estate in the same manner as if the said absent person were dead.

V. *Provision for disposal of heritable estate after twenty years absence where no previous deliverance relative to income under* § 1.—In the case of any person who has been absent from Scotland, or who has disappeared for a period of twenty years or upwards, and who has not been heard of for twenty years, and who at the time of his leaving or disappearance was possessed of or entitled to heritable estate in Scotland, or who has since become entitled to heritable estate there, it shall be competent to any person entitled to succeed to said absent person in such heritable estate to present a petition to the Court setting forth the said facts; and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to, enter into possession of and enjoy, and sell or dispose of the said heritable estate in the same manner as if the said absent person were dead.(*d*)

VI. *Power to dispense with consent of absent person to sale of property held* pro indiviso.—Where the absent person shall have been one of two or more *pro indiviso* proprietors of heritable estate in Scotland, and he shall not have been heard of for seven years or upwards after his leaving Scotland or disappearance, and where the other *pro indiviso* proprietor or proprietors shall desire to sell the said estate, it shall be competent to such other *pro indiviso* proprietor or proprietors to present a petition to the Court setting forth the said facts, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner or petitioners to sell the said estate by public roup or private bargain, as the Court may think fit, and the title granted by the said *pro indiviso* proprietor or proprietors under such authority shall be as good and valid to the purchaser as if the absent person had been a party to the sale and conveyance, and in the case of such a sale the share of the price belonging to the absent person shall be paid into bank for behoof of such absent person, and shall be deemed to be heritable estate of the said absent person, and as such shall be subject to the provisions of sections one, three, and five hereof.

VII. *Claim of absent person barred after thirteen years from date*

(*d*) In a petition to uplift estate, proof was required (1) that the person whose succession was in question had lived up to the time at which he became entitled to the succession; and (2) had not since been heard of.—Petitions, *Tawse* and *M'Gregor*, 15th and 18th July, 1882, 19 S. L. R. 829.

of deliverance.—In the event of the absent person having right to heritable or moveable estate in Scotland as aforesaid, or of any person entitled to succeed to or take by title derived from him preferably to the person who has obtained possession of the heritable or moveable estate under any of the preceding sections of this Act, appearing and establishing his right thereto, he shall be entitled to demand and receive the fee or capital of the said estate, heritable or moveable, where extant in the hands of the person or persons who has or have obtained possession thereof as aforesaid, or of any one taking from him by gratuitous title (subject to a claim for the value of any meliorations made thereupon by such person), or to demand and receive the price obtained for the said property, where the same has been sold, unless a period of thirteen years has elapsed since possession of the fee of such estate was obtained under the other provisions of this Act, and after the expiry of such period of thirteen years all claim by the absent person, or those entitled to succeed or deriving right from him as aforesaid, shall be barred. In no case shall any person who has uplifted the income of property under any of the provisions of this Act, or the income of the price obtained therefor, prior to the absent person or those in his right as aforesaid appearing and intimating their claim, be liable to account for or pay to the absent person or those in his right the income received as aforesaid prior to the intimation of such claim.

VIII. *Presumption of time of death.*—For the purposes of this Act, in all cases where a person has left Scotland, or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of, at or after such leaving or disappearance.(*e*)

IX. *Several persons may be conjoined in one petition.*—Any number of persons entitled to succeed as aforesaid may be conjoined in one petition relating to the estate of the same absent person; and any person having a limited right of succession may appear as petitioner

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(*e*) In the case of a person last heard of on 31st March, 1843, it was held that he must be presumed to be dead, and that 1st January, 1850, was a reasonable date to fix as the date of death.—*Rhind's Trustees*, 15th January, 1878, 5 R. 527.

A. left this country "30 years ago." His next-of-kin applied under § 4 of this Act to make up a title and divide a succession, which opened twenty-three years after his disappearance. Petition refused, in respect that in terms of this section, A. must be held to have died seven years after he was last heard of, and so to have predeceased the opening of the succession. — Petition, *Craig, &c.*, 20th January, 1882, 19 S. L. R. 358.

to the effect of having such right made effectual, subject to the provisions of this Act.(*f*)

X. *Saving the rights of third parties.*—It is hereby expressly provided and declared that nothing in this Act contained shall be held to prejudice or affect the right of third parties, having right to the estate or any part of it, preferable to the right of the absent person, or to the right of his representatives derived from him.

XI. *Policies of assurance exempted.*—This Act shall not apply to any claim under a policy of assurance upon the life of any person who has been absent from Scotland, or who has disappeared, but the person or persons claiming under such policy shall be required to prove the death of the person whose life is assured, in the same manner as if this Act had not been passed.

XII. *Jurisdiction.*—For the purposes of this Act "the Court" shall mean and include—

(1.) In all cases one of the Divisions of the Court of Session:

(2.) In all cases where the estate of the absent person in Scotland does not exceed in amount or value the sum of one hundred and fifty pounds sterling, the Sheriff-Court of the county in which said estate or the greater part thereof is situate: Provided always, that the value of heritable estate shall be ascertained in terms of the provisions of the 40 & 41 Vict. c. 50.

XIII. *Short title.*—This Act may be cited as the Presumption of Life Limitation (Scotland) Act, 1881.

XXVII.—*An ACT for repealing certain Duties on Legacies and Shares of Personal Estates, and for granting other Duties thereon in certain cases,* 36 *Geo. III. c.* 52.—[26*th April,* 1796.]

The following is the arrangement of this Act:—

Section 1. Old duties on receipts. This section repealed by 35 & 36 Vict. c. 63, 1872.

„ 2. New duties granted. This section repealed by 35 & 36 Vict. c. 63, 1872. For duties now in force, see 55 Geo. III. c. 184, schedule, Part III.; also, 43 Vict. c. 14, § 13; 44 Vict. c. 12, §§ 36, 41, 42.

(*f*) Any number of persons entitled to succeed, including those having a limited right of succession, may be conjoined in one petition.—*Morrison, &c.*, 22nd July, 1882, 19 S. L. R. 442; *Thomson, &c.*, 24th June, 1882, 19 S. L. R. 738.

Section 3. Duties to be under the management of the Commissioners of Stamps. This section repealed by 35 & 36 Vict. c. 63, 1872.—See 44 Vict. c. 12. § 26, 1881.

„ 4. Commissioners to appoint receivers of the duties, and to keep accounts.

„ 5. Commissioners may provide printed receipts and forms.

„ 6. Duties to be paid by executors or administrators on retaining or paying legacies; if not paid, amount to be Crown debts.

„ 7. What are deemed legacies. This section repealed by 35 & 36 Vict. c. 63, 1872.—See now 8 & 9 Vict. c. 76, § 4.

„ 8. Mode of calculation of the value of and duty on annuities; the duty to be paid by instalments.—See also 16 & 17 Vict. c. 51, § 31.

„ 9. Mode of calculation of the value of and duty on annuities payable out of legacies.

„ 10. Mode of calculation of the duty on legacies given to purchase annuities.

„ 11. Duty on legacies whose value can only be ascertained by the application of the allotted fund.

„ 12. Duty on legacies enjoyed by persons in succession or having partial interest therein.

„ 13. By whom such duty is payable.

„ 14. Plate, furniture, &c., not liable to duty till in possession of persons able to dispose thereof.—See 39 Geo. III. c. 73 *supra*.

„ 15. Duty on legacies enjoyed in succession to be charged as such, whether taken under will or by intestacy.

„ 16. Duty on legacies in joint tenancy.

„ 17. Duty on legacies subject to contingencies.

„ 18. Duty on legacies subject to power of appointment.

„ 19. Duty on personal estate directed to be applied in purchase of real estate.

„ 20. Duty on estates *pur autre vie* applicable as personal estate.

„ 21. Money left to pay duty not chargeable as a legacy.

„ 22. Duty on property not reduced into money.

„ 23. Duty on legacies not satisfied in money.

„ 24. Legatees refusing to allow duty liable to pay the costs of any suit.

„ 25. In administration suits, the Court to provide for the payment of duty.

„ 26. Executors, &c., may pay legacies and duty in part.

Section 27. No legacy liable to duty to be paid without a receipt, duly stamped. Copy of entry at the office of payment of duty to be evidence.

„ 28. Penalty of ten per cent. for paying or receiving legacy without stamped receipt.

„ 29. Receipts to be stamped within twenty-one days after date, and after that time, on payment of penalty; but none to be stamped unless duty be paid.

„ 30. Mistakes in paying duty may be rectified by the Commissioners.

„ 31. Persons paying or receiving legacies contrary to this Act indemnified on discovering the other offender.

„ 32. If legatee be an infant or absent, money to be paid into the bank.—See also 37 Geo. III. c. 135 *infra*.

„ 33. Power to the Commissioners to compound the duty.—See also 43 Vict. c. 14, § 11; and 44 Vict. c. 12, § 43.

„ 34. If legacy be refunded, duty to be repaid.

„ 35. Executors, previous to retaining their own legacies, to transmit particulars, &c., to the Commissioners.—See also 28 & 29 Vict. c. 104, Part V.

„ 36. Receipts for legacies. Repealed by 35 & 36 Vict. c. 63, 1872.

„ 37. If probate or administration be revoked, any duty which has been improperly paid to be returned, or, if properly paid, to be allowed.

„ 38. Persons swearing falsely guilty of perjury.

„ 39. Penalty of £500 for altering receipts.

„ 40. Persons forging stamps, &c., to suffer death. Repealed by 34 & 35 Vict. c. 116, 1871.

„ 41. Receipts duly stamped under this Act not liable to receipt duty.

„ 42. Extension of powers of former Acts. Repealed by 35 & 36 Vict. c. 63, 1872.

„ 43. Recovery and application of penalties sued for within three months. Repealed in effect by 31 & 32 Vict. c. 124, § 9, 1868.

„ 44. Recovery and application of penalties not sued for within three months.

„ 45. Duties to be paid to Receiver-General, &c. Repealed by 34 & 35 Vict. c. 116, 1871.

„ 46. Application of duties. Repealed by 34 & 35 Vict. c. 116, 1871.

„ 47. Limitation of actions.

Schedule repealed by last-mentioned Act.—See p. 438.

I., II., III. repealed by 35 & 36 Vict. c. 63 (1872).

IV. And be it further enacted, That the said Commissioners shall, by writing under their hands and seals, or the hands and seals of the major part of them, appoint proper persons in the several counties, shires, stewartries, ridings, and divisions in Great Britain(*h*), as occasion shall require, to collect and receive the duties hereby imposed, and to keep proper accounts thereof, to be transmitted to the head office of the said Commissioners; and upon payment of any such duty, if paid at the head office of the said Commissioners, the said Commissioners shall cause the same to be duly entered in their books, and to be set down therein to the account of the personal estate in respect whereof the said duty shall be paid, and shall make like entries in their books, upon transmission of the proper accounts for that purpose from the several officers to be appointed by the said Commissioners in the different counties, shires, stewartries, ridings, and divisions aforesaid, to whom they shall from time to time give proper orders for such purpose; and the accounts of such payments shall be kept, with proper references, in alphabetical order, according to the surname of the testator, testatrix, or intestate, in respect of whose personal estate such payments shall have been made respectively, so that it may at all times appear upon the books of the said Commissioners what payments have been made in respect of the personal estate of any testator, testatrix, or intestate.

V. And in order that all persons may be enabled to take receipts and discharges on the payment or satisfaction of any legacy, or residue of any personal estate, or any part thereof, according to the directions prescribed by this Act: Be it further enacted, That it shall be lawful for the said Commissioners of Stamp Duties, from time to time, to provide sufficient quantities of paper adapted for such receipts or discharges as aforesaid, and to cause to be printed thereon the form of words in the schedule hereunto annexed(*i*); and it shall also be lawful for any of his Majesty's subjects, requiring such receipts or discharges, to cause the same to be duly filled up with sums, names, and date, according to the provisions before mentioned, and also upon any vellum or parchment, or upon any other paper not provided by the said Commissioners, to use the like form whenever there shall be occasion.

VI. And be it further enacted, That the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided(*k*), be

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(*h*) Persons are thus enabled to pay the duties in the district in which they reside.

(*i*) See present forms in §§ 304-306 *supra*.

(*k*) The cases here referred to as *otherwise* provided for are those provided for by §§ 9, 13, and 14 *infra*.

The cases provided for by this section embrace—(1) an absolute pecuniary legacy;

accounted for, answered, and paid by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her, or their own benefit(*l*), or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled(*m*); and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled so to retain either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this Act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this Act, having received or deducted the duty so chargeable, then, and in every of such cases, the duty which shall be due and payable upon every such legacy, and part of legacy and residue, and part of residue respectively, and which shall not have been duly paid and satisfied to his Majesty, his heirs and successors, according to the provisions of this Act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid to his Majesty, his heirs and successors; and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of

(2) an absolute specific legacy of funded property; (3) an absolute specific legacy of household furniture, &c.; (4) an absolute specific legacy of leasehold property; (5) a legacy of money to a minor, with interest for maintenance during minority; (6) a legacy to an infant considered to carry interest; (7) an absolute pecuniary legacy without interest, the payment of which is deferred; (8) a bequest of the residue with a legacy payable thereout.

(*l*) See § 35 of Act.

(*m*) See §§ 27, 28, 29 of Act.

any person or persons entitled thereto, without having received or deducted the duty chargeable thereon (such duty not having been first duly paid to his Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to his Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made.

VII. Repealed by 35 & 36 Vict. c. 63 (1872).

VIII. And be it further enacted(*o*), That the value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedule hereunto annexed(*p*); and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively(*q*); and the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency(*r*); Provided always, that if any such annuity shall determine by the death of any person, before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency

(*o*) The cases provided for by this section embrace—(1) a simple annuity for life; (2) an annuity to one person during the life of another; (3) an annuity for a given term of years; (4) an annuity determinable on a contingency besides death; (5) an annuity to two persons for their joint lives and the life of the survivor; (6) an annuity for the joint continuance of two lives; (7) a contingent pecuniary legacy to a minor without interest.

(*p*) Other tables are now substituted by 16 & 17 Vict. c. 51 *infra*.

(*q*) The value of an annuity depends on the age of the annuitant. [The examples noted under this and the following sections are taken substantially from J. H. Brady's "Abstracts of the Legacy Acts," London, 1851.] A. gives to B., his brother, an annuity of £100 for his life. The age of B. we will suppose to be fifty. The value of this annuity then, by the tables annexed to 16 & 17 Vict. c. 51, is £1242, 19s. 6d., and the legacy duty thereon, at 3 per cent., the rate to which a brother is liable, is £37, 5s. 9d. One-fourth of this latter sum, therefore, will be payable by B. yearly out of the first four years' payments of his annuity, provided he lives so long.—See illustrations on page 481 below.

(*r*) See § 17 of Act.

than the death of any person or persons(*s*), then and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease, but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duty so paid as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured; which abatement the said Commissioners for Management of the Stamp Duties shall settle and determine according to the tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same out of any moneys in their hands arising from the duties imposed by this Act.(*t*)

IX. And be it further enacted, That the value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated, and the duty shall be charged thereon, in the same manner as hereinbefore directed with respect to other annuities; and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy after deducting the value of such annuity; and the duty for such annuity shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal payments, in the same manner as the same would be payable according to the provisions hereinbefore contained, if such annuity had been a direct gift to the annuitant, and subject to the like proviso in case such annuity shall determine before four years' payment shall become due; and the payment which shall be made for such duty shall be retained by the person or persons paying the same, out of the first

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(*s*) *Example.*—Suppose an annuity of £100 had been given by A. to B., his brother, aged twenty, for his life, provided he should not marry. B. marries on the expiry of eight years. He has previously paid the whole duty of £51, 17s. 5d.; but as his annuity has only endured eight years instead of for life, the return of duty which he will be entitled to will be calculated as follows:—

	Value.
B. has paid upon the value of an annuity of £100 for life,	£1729 9 6
Deduct therefrom the value of an annuity of £100 for eight years, ...	673 5 0
There remains in value overpaid, . . .	£1056 4 6

The duty upon which at 3 per cent. is £31, 13s. 7d., which sum so overpaid, B. is entitled to receive back.

(*t*) This section incorporated into 16 & 17 Vict. c. 51, by § 32 of that Act.

four years payments of such annuity, if so many shall become due, or out of so many of such payments as shall become due, by equal portions.(*u*)

X. And be it further enacted(*v*), That the duty payable upon any legacy given by direction to purchase with any personal estate of the testator or testatrix, or any part thereof, an annuity of a certain amount(*w*) for the life or lives of any person or persons or any other term, shall be calculated upon the sum necessary to purchase such annuity according to the tables before mentioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies; and the person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied, shall be discharged, by payment of such duty so calculated as aforesaid, from all other demands in respect of the duty payable on such legacy; and the annuity to be purchased for the benefit of the person or persons entitled to the benefit of such legacy shall be reduced in proportion to the amount of the duty payable thereon as aforesaid, such reduction to be calculated in the same manner as the duty so payable is hereinbefore directed to be calculated; and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased.

XI. And be it further enacted(*x*), That if any benefit shall be

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(*u*) This section deals with the case of annuity payable out of a legacy. *Example.*—A legacy of £1000 is bequeathed to C. subject to the payment of an annuity of £10 to D., aged forty, for his life. The value of the said annuity is £148, 15s. (upon which duty is to be paid as before noted respecting annuities), which being deducted from the legacy of £1000, leaves £851, 5s. upon which C. is chargeable with duty according to the rate to which he is liable.

But see § 36 of 44 Vict. c. 12, as to relief from legacy duty in certain cases; also §§ 41-43 of same Act, and § 11 of 43 Vict. c. 14.

(*v*) See note (*t*) *supra*. This section embraces the cases of—(1) a legacy by directions to purchase an annuity of a certain amount; (2) a legacy of a given sum to purchase an annuity.

(*w*) *Example.*—An annuity of £100 is directed to be purchased for the life of C., aged thirty, the brother of the deceased. The value of such annuity is £1644, 7s. 6d., the duty on which at 3 per cent. is £49, 6s. 6d., which amount of duty will purchase (according to the said tables) for the same life an annuity of £3; and this sum being deducted from the annuity directed to be purchased, leaves £97 as the abated annuity to be purchased by the executor. A readier mode of ascertaining this is to deduct the rate of duty per cent., to which the annuitant is liable from every £100 of the annuity itself, and the remainder will be the reduced annuity to be purchased.

(*x*) See note (*t*) *supra*; also § 37 of 16 & 17 Vict. c. 51. This section deals with the case of a legacy, the amount of which can only be ascertained from time to time by application of the allotted fund. *Example.*—A. gives to his executors £1000, to apply the income therefrom, or so much thereof as they think fit, with a

given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any will or testamentary instrument, cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained; then, and in every such case, such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same.

XII. And be it further enacted(*y*), That the duty payable on a

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portion of the principal from time to time, if they think fit, for the benefit of his son B. during his minority, and to pay the principal, with accumulations, if any, or what may remain thereof, to B. on his attaining twenty-one, or, should he die under that age, to another liable to a different rate of duty. The executors in such a case may apply £20 one year, £50 the next, and so on. Upon the sums, therefore, *as applied*, the duty is payable; and the duty upon what may remain in the executors' hands, on B. attaining twenty-one, or dying under that age, will not be payable until one of those events takes place, and then either at the rate to which B. is liable, or at that which may be chargeable, in the event of his death, to the party who in that case would become entitled.

§ 43 of 44 Vict. c. 12 provides for a claim for legacy duty under a will being compounded for a single immediate payment.

(*y*) See note (*t*) *supra*.

This section embraces the cases of (1) a legacy to different persons in succession, who are liable to the same rate of duty; (2) a legacy to different persons in succession, who are liable to different rates of duty; (3) a legacy in succession, with a partial interest payable thereout. *Example* 1.—A. gives his executors £1000 to invest, and pay the income to his son B. for life, and after his death to his son C. for life, and after the death of the survivor to his son D. These persons being liable to the same rate of duty, 1 per cent. is payable upon the principal immediately, as though it had been a simple legacy to B.; and B. and C. thus take a reduced annuity for their respective lives, and D., after their deaths, takes the reduced principal.

See § 41 of 44 Vict. c. 12 as to the cases where 1 per cent. duty is now payable.

Example 2.—A. gives to his executors £1000 to invest, and pay the income to his brother B., aged forty, for life; and after B.'s death to B.'s wife, aged thirty-five, for her life; and after the death of the survivor, the principal among their children. The income is £40, the value of which for the life of B., aged forty, is £595 0 0

And the duty at 3 per cent. is 17 17 0

Which duty is payable as directed by § 8 of this Act.

After B.'s death, his wife, a stranger in blood to A., and whose age is then thirty-five, becomes entitled to the income. The value of the annuity to her is 629 19 0

The duty on which at 10 per cent. is 63 0 0

Which duty is payable as above.

legacy, or residue or part of residue of any personal estate given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy, or residue or part of residue, so given, as in the case of a legacy to one person; and where any legacy, or residue or part of residue, shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests charged on any property given otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy, or residue or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession.

XIII. And be it further enacted, That the duty payable on any legacy, or residue or part of residue, so given to or so to be enjoyed by different persons in succession, upon whom the duty shall be

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After the death of the survivor, their children become entitled to the capital, upon which duty is then payable at 3 per cent.

See as to compounding the duty, § 11 of 43 Vict. c. 14, and § 43 of 44 Vict. c. 12, *infra*.

chargeable at one and the same rate, shall be deducted and paid by the person or persons having or taking the burthen of the execution of the will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy, or residue or part of residue, to any trustee or trustees, or any other person or persons to whom the same shall be payable or paid in trust, or for the benefit of the persons so entitled thereto in succession; and if the same shall not be so paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt, by any of the persons so entitled in succession, of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received; and where the duty chargeable upon any such bequest for the benefit of or to be enjoyed by different persons in succession shall be chargeable at different rates, so that the same cannot be paid at one and the same time, but must be paid in succession as aforesaid, then and in such case all and every the person or persons having or taking the burthen of the execution of the will or testamentary instrument in which such bequest shall be contained shall be chargeable with such duties in succession, in the same manner as such persons would be chargeable with the like duties in case of immediate bequest; unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee as aforesaid, in which case such trustees or trustee, or his, her, or their representatives, shall be chargeable with the duties for and in respect of such property so vested in him, her, or them respectively in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the will or testamentary instrument by which such bequest shall have been made; and in like manner, where any partial interest shall be given, or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied or paid by the person or persons so enjoying such property, such person or persons shall be chargeable with the duties for and in respect of such partial interest, and shall retain and pay the same accordingly, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the will or testamentary instrument by which such partial instrument shall have been created; and in all such cases the person or persons so chargeable with duty shall be debtors to the King's Majesty, his heirs and successors, in like manner, and shall be subject to the like penalties, as the person or persons having or taking the burthen of the execution of such will or testamentary instrument are hereby made chargeable and subject to.

XIV. Provided always, and be it further enacted(*z*), That no duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely, and with full power to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell or dispose thereof, or an absolute interest therein, and shall become the debt of such person or persons; but shall not be a charge on any person or persons by reason of his, her, or their having assented to such bequest, as the person or persons having or taking the burthen of the execution of the will or testamentary instrument by which such bequest shall have been made.

XV. Provided always, and be it further enacted, That where any legacy, or any residue or part of residue, shall be so given by any will or testamentary instrument, that different persons shall become entitled thereto in succession, the duty shall be charged thereon as given to be enjoyed in succession, whether the person or persons entitled thereto shall take the same under or by virtue of such will or testamentary instrument, and the dispositions therein contained, or in default of such dispositions, and as entitled by intestacy.

XVI. And be it further enacted(*a*), That where any legacy, or residue or part of residue, shall be given to or for the benefit of any person or persons in joint tenancy, some or one of whom shall be

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(*z*) See note (*t*) *supra*.

This section deals with the case of a legacy of plate and furniture to be enjoyed in succession in kind. *Example.*—A. bequeaths household furniture, plate, &c., to B. for life, and after B.'s death to C. for life, and after the death of B. and C. to D. absolutely. The duty is not under this section payable until the property falls to D. But see the recent Acts noted under note (*y*) *supra*.

Books, pictures, &c., bequeathed to any body corporate to be preserved are exempted from duty.—39 Geo. III. c. 73 *infra*.

(*a*) This section embraces the case of a legacy in joint tenancy to two persons, the one liable, and the other not liable, to duty. *Example.*—A house is given by A. to his wife and son jointly, the former not liable to duty, and the latter liable in one per cent. If both survive A. duty is payable on his death upon the son's half at one per cent., and should the son afterwards survive his mother, or if the tenancy be severed by her in her lifetime, he then becomes liable to duty for the other half, to which he would in either case be entitled.

chargeable with any duty hereby imposed, and some or one of whom shall not be so chargeable, the person or persons chargeable with duty shall pay such duty in proportion to the interest of such person or persons respectively in such bequest (*b*); and if any person or persons chargeable with duty, and entitled in joint tenancy as aforesaid(*c*), shall become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property bequeathed, than that in respect of which such duty shall have been paid, then, and in such case, all and every such person or persons so becoming entitled by survivorship, or by severance, shall be charged with the same duty as if the property to which such joint tenant or joint tenants shall so become entitled had been originally given to or for the benefit of such person or persons only.

XVII. And be it further enacted(*d*), That when any legacy, or any residue or part of residue, shall be given, subject to any contingency which may defeat such gift, and whereupon the same may go to some other person or persons, such bequest (unless chargeable as an annuity under the provisions herein contained)(*e*) shall be charged with duty as an absolute bequest(*f*) to the person or persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy, or residue or part of residue, notwithstanding the same may, upon such contingency, go to some person not chargeable with the same duty, or with any duty; and if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix, under the same title, would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto shall be charged with and shall pay the difference between the duty so paid, and such higher rate of duty.(*g*)

(*b*) See § 11 of 16 & 17 Vict. c. 51 *infra*.

(*c*) See §§ 2 and 3 *ibid.*

(*d*) This section provides for the case of a legacy subject to a contingency which may defeat the gift.

Example.—A. gives £1000 to his trustees in trust, to pay to B., his son, during minority, the income; and should B. attain twenty-one, the principal also; but should B. die under twenty-one, to his nephew, C. On the death of A., B. pays one per cent.; and should he die under twenty-one, C. must pay the difference between the one per cent. and the rate of three per cent. to which he is liable. But if the £1000 had been left for the benefit of C. during minority, and principal to him at twenty-one, and should he die under twenty-one, to B., the duty would be payable at A.'s death at three per cent., and no duty would be returned although B. might succeed by C. dying under age.

See recent Acts referred to in note (*y*) *supra*.

(*e*) See § 8 of Act.

(*f*) See § 6 of Act.

(*g*) See corresponding enactment in 16 & 17 Vict. c. 51, § 36.

XVIII. And be it further enacted(*h*), That where any legacy, or the residue or any part of the residue, of any personal estate, shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power(*i*), such property shall be charged with duty as property given to different persons in succession(*k*); and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether previous, or subject to, or under, or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them respectively in and by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be; and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom

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(*h*) This section provides for the cases of (1) a legacy subject to a power of appointment for the benefit of persons specially named; (2) a legacy for a limited interest, with a power of appointment to persons to whom it *would not* belong in default of appointment; (3) a legacy with a power of appointment to persons to whom the same *would* belong in default of appointment.

Example 1.—A. leaves £1000 to B. for life, and after his death to C.'s children, as B. shall appoint. Duty is payable in the first instance upon the capital, provided B. and his children be liable to the same rate of duty; but if liable to different rates, then by way of annuity: in either case, in accordance with § 12 of the Act, as a legacy in succession.

Example 2.—A. leaves £1000 to B. for life, or any other term, with power to B. to test on it, but in default of B. so testing, the money to return to A.'s estate. The duty is first payable on B.'s interest, and afterwards, if he should test, duty is payable on the capital according to the rate to which B. is liable. As for instance, £1000 is given to B., aged forty, a stranger in blood to A., for his life, with power to B. to test on the money. Suppose the £1000 to produce £40 per annum.

Value of an annuity of £40 for a life aged forty, . . .	£595 0 0
The duty upon which at ten per cent. is, ...	59 10 0
B. does not test until he has paid the whole duty. When he does test, the duty payable on the capital would be, . . .	£100 0 0
Deduct duty before paid on life interest, ...	59 10 0
Leaves to be paid by B. on testing, ...	£40 10 0

Example 3.—A. bequeaths £1000 to B. for life, and after his death to whoever he shall leave it, and in default to his executors. The property thus belonging absolutely to B., the duty is charged on the capital.

(*i*) See § 4 of 16 & 17 Vict. c. 51.

(*k*) As provided by § 12 of Act.

property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof; and where any property shall be given with any such general power of appointment, which property in default of appointment will belong to the person or persons to whom such power shall also be given, such property shall be charged with and shall pay the duty by this Act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance(*l*), without such power of appointment.

XIX. And be it further enacted(*m*), That any sum of money or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided nevertheless, that in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.

(*l*) See § 7 of Act.

(*m*) This section provides for the cases of (1) money to purchase heritable estate given absolutely; (2) money to purchase heritable estate to be enjoyed in succession.

Example 1.—A. gives his trustees £1000 to buy heritable property to be conveyed to his brother B., his heirs and assignees. Duty at 3 per cent. is payable on the £1000. *Example* 2.—A. leaves his son B. his heritable estate for life, and after B.'s death to his brother C. for life, and after the death of B. and C. to C.'s children in fee. A. directs that £1000 be laid out in buying an estate with the above destination. If the trustees buy the estate before the expiration of twelve months from A.'s death, no duty will be payable *under this section*, but otherwise B.'s life-interest falls to be valued as annuity for his life, and duty paid thereon; and at B.'s death C. will be liable if the money is not invested within twelve months of *his* death. But see § 30 of 16 & 17 Vict. c. 51 *infra*.

XX. And be it further enacted, That estates *pur autre vie*(*n*), applicable by law in the same manner as personal estate, shall be charged with the duties hereby imposed as personal estate.

XXI. Provided always, and be it further enacted, That if any direction shall be given, by any will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest(*o*) out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy to or for the benefit of the person or persons who would otherwise pay such duty.

XXII. And be it further enacted, That in cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money, it shall be lawful for the person or persons having or taking the burthen of the administration of such effects, or the person or persons by whom the duty thereon ought to be paid, to set a value thereon, and offer to pay the duty according to such value; or to require the Commissioners for Management of the Stamp Duties to appoint a person to set such value at the expense of the person or persons by whom such duty ought to be paid; and it shall be lawful for the Commissioners to accept the duty offered to be paid, upon the value set by the person or persons having or taking the administration of such effects, or by whom the duty for the same shall be payable, without such appraisement, if the said Commissioners shall think fit so to do; but if the said Commissioners shall not be satisfied with the value so set, on which the duty shall be so offered, it shall be lawful for the said Commissioners, notwithstanding such offer, to appoint a person to appraise such effects, and to set the value thereon, on which value so set the said Commissioners shall assess the duty payable in respect thereof, and require the same to be paid; but if the person or persons by whom such duty shall be payable shall not be satisfied with the valuation made under the authority of the said Commissioners, and pay the duty accordingly, it shall be lawful for such person or persons to cause the valuation so made under the authority of the said Commissioners to be reviewed by the Commissioners of the Land Tax for the time being of the district or place where such effects shall be, at their next meeting, after the said Commissioners for Management of the Stamp Duties shall have assessed and required payment of such duty as aforesaid, if fourteen days shall have elapsed between such time

(*n*) See § 291 *supra*.
(*o*) See § 18 of 16 & 17 Vict. c. 51 *infra*.

and the meeting of the said Commissioners of Land Tax, and if not, then at the next succeeding meeting of the said Commissioners, of which appeal six days' notice shall be given to the said Commissioners of Stamp Duties; and the said Commissioners of the Land Tax shall and may (if they think fit) appoint a person to appraise such effects, and set a value thereon, and shall and may hear and determine such appeal, in the same manner as in any other cases of appeal to them, and with the like authorities, and their judgment shall be final; and if the valuation made under the authority of the said Commissioners of the Stamp Duties in the case last-mentioned shall not be duly appealed from within the time aforesaid, or shall be affirmed upon appeal, the duty shall be paid according to such valuation; and if any variation shall be made on such appeal, the duty shall be paid according to such variation; and if the duty assessed in manner aforesaid shall exceed the duty offered to and refused by the said Commissioners of Stamp Duties, the expense of such appraisement and other proceedings in assessing such duty shall be borne by the person or persons by whom such duty shall be payable; and if any dispute shall arise between any person or persons entitled to any such legacy, or residue or part of residue, and any person or persons having or taking the burthen of the administration of such effects, with respect to the value thereof, or with respect to the duty to be paid thereon, the duty shall be assessed by the said Commissioners of Stamp Duties on reference to them by either party for that purpose; and if the value of any property on which such duty ought to be paid shall be in dispute, the said Commissioners of the Stamp Duties shall cause an appraisement to be made thereof, at the expense of the person or persons by whom such duty ought to be paid, in the manner hereinbefore directed in other cases, and assess the duty thereon accordingly; and if such person or persons by whom such duty ought to be paid shall be dissatisfied with such valuation, or with the assessment of duty made upon such valuation by the said Commissioners of the Stamp Duties, the same shall be reviewed and finally determined by the said Commissioners of the Land Tax upon appeal to them within the time, and under the restrictions, and in the manner hereinbefore directed in other cases; but if such valuation or assessment shall not be duly appealed from within the time limited for that purpose, or shall be affirmed upon appeal, the duty shall be paid according thereto; and if any variation shall be made therein on such appeal, the duty shall be paid according to such variation; and in case the effects whereon any such duty shall be payable shall be at the distance of ten miles from London, then, and in such case, it shall be lawful to make the

like application to such person as shall be deputed for that purpose by the said Commissioners to act in their stead, in such cases within the county or district in which such effects shall be ; and such person so deputed shall act in such cases, in all respects, in the same manner as the said Commissioners are hereby authorised to act, subject, nevertheless, to the instructions and control of the said Commissioners.(*p*)

XXIII. And be it further enacted(*q*), That where any legacy or part of any legacy, or residue or part of residue, whereon any duty shall be chargeable by this Act, shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount or value thereof, then, and in such case, the duty shall be charged and paid in respect of such legacy or part of legacy, or residue or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same : Provided always, that if any legacy or bequest shall be made in satisfaction of any other legacy or bequest, or title to any residue or part of residue, of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty.(*r*)

XXIV. And be it further enacted, That if any person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, or any other person or persons hereby made chargeable with duty, shall declare himself, herself, or themselves ready and willing, and shall accordingly offer to pay any pecuniary legacy, or residue or part of residue, deducting the duty payable thereon, or shall in like manner offer to deliver or otherwise dispose of any specific legacy, or any specific property, part of any residue of any personal estate, to or for the benefit of the person or persons entitled thereto, or to any trustee or trustees for such person or persons, upon payment of the duty payable in respect thereof, and the person or persons entitled to such legacy, or the residue or part of residue, or the trustee or trustees for such person or persons, shall refuse to accept such offer, and to give a proper release and discharge for such legacy or residue, or so much thereof as shall be offered to be paid, delivered, or otherwise disposed of as

(*p*) See § 45 of 16 & 17 Vict. c. 51 *infra*.

(*q*) Incorporated into 16 & 17 Vict. c. 51, by § 32 thereof.

(*r*) *Example.* A. gives to B. £100 in trust for B.'s child. B. dies without paying the money to his child, but in his will he directs that another legacy be given to the child in satisfaction of the £100 legacy. Duty is charged in terms of this section.

aforesaid, then, and in such case, although no actual tender shall be made, if any suit shall be afterwards instituted for such legacy or effects, respecting which such offer shall have been made, it shall be lawful for the Court in which such suit shall be instituted to order all costs, charges, and expenses attending the same, to be paid by the person or persons who shall have refused to accept such offer, and to give or join in such release or discharge, or to order such costs, charges, and expenses to be deducted and retained out of such legacy or effects, together with the duty payable thereon, as the said Court shall see fit; and in case any suit shall be instituted for payment of any legacy, or residue or part of residue, of any personal estate, and the person or persons sued for the same shall be desirous of staying proceeding in such suit, on payment of the money due, or delivering or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the Court in which such suit shall be instituted, if it shall see fit, on application in a summary way, to make such order for payment of such legacy, or residue or part of residue, or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges, and expenses attending such suit, as shall be just.

XXV. And be it further enacted(*s*), That if any suit shall be instituted concerning the administration of the personal estate of any person dying testate or intestate, or any part of such estate in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the Court wherein such suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and in taking any account of any personal estate, or otherwise acting concerning the same, such Court shall take care that no allowance shall be made in respect of any legacy or part of legacy, or of any residue or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed.

XXVI. Provided always, and be it further enacted, That any person or persons having or taking the burthen of the execution of any will or other testamentary instrument, or the administration of the personal estate of any person deceased, may from time to time pay, deliver, or otherwise dispose of any legacy, or any part of any legacy, or make distribution of any part of the residue of any personal estate, on payment, from time to time, of such proportions

(*s*) The provisions here supplemented by § 53 of 16 & 17 Vict. c. 51.

of the duty hereby imposed as shall accrue in respect of such part of such personal estate as shall be so administered.

XXVII. And be it further enacted, That no person or persons having or taking the burthen of the execution of any will or testamentary instrument, or the administration of the personal estate of any person deceased, nor any trustee or trustees, or other person or persons hereby directed and required to account for any duty, shall, from and after the passing of this Act, pay, deliver, or otherwise dispose of, or in any manner satisfy, discharge, or compound for, any legacy whatsoever, or any part thereof, or the residue of any personal estate, or any part thereof, in respect whereof any duty is hereby imposed, without taking a receipt or discharge in writing for the same, expressing the date of such receipt or discharge, and the names of the testator, testatrix, or intestate, under whose will or testamentary disposition, or upon whose intestacy the title to such legacy or part of legacy, or to such residue or part of residue, shall accrue, and of the person or persons to whom such receipt or discharge shall be given, and of the person or persons to whom such legacy, or residue or part of residue, shall have been given, or shall have belonged in consequence of intestacy, and the amount or value of the legacy or part of legacy, or residue or part of residue, for which such receipt or discharge shall be given, and also the amount and rate of the duty payable and allowed thereon(*t*); and that no written receipt or discharge for any legacy or part of any legacy, or for the residue of any personal estate, or any part of such residue, in respect whereof any duty is hereby imposed, shall be received in evidence, or be available in any manner whatever, unless the same shall be stamped, as required by this Act; and no evidence whatsoever shall be given of any payment, satisfaction, or discharge whatsoever, or of any release or composition of such legacy, or any part thereof, or of such residue, or any part thereof, without producing such receipt or discharge, duly stamped as aforesaid, unless the actual payment of the duty hereby imposed shall first be given in evidence: Provided always, that a copy of the entry, in the books of the Commissioners of the Stamps, of the payment of such duty, shall be admitted as evidence thereof: Provided also, that payment of any annuity shall not be deemed a payment for which such stamped receipt shall be required, under the directions of this Act, except the several payments which shall complete the payments for each of the first four years during which such annuity shall be payable; and in like manner any payment in respect of any legacy or bequest, hereby directed to be

(*t*) After the whole of the legacy duty has been paid, which may be paid either by one or by four annual instalments, the executor may take common receipts for the annuity.

charged with the duty in the same manner as annuities are hereby made chargeable with duty, shall not be deemed a payment for which such stamped receipt shall be required, except the several payments which shall complete the payments for each of the first four years, in respect of which such legacy or bequest shall be chargeable with duty as an annuity.

XXVIII. And be it further enacted, That any person having or taking the burthen of the execution of any will or testamentary instrument, or the administration of the personal estate of any person deceased, and any trustee or trustees, or other person or persons, hereby directed and required to account for any duty, who shall pay, deliver, or otherwise dispose of, or in any manner satisfy or discharge, or compound for any legacy given by such will or testamentary instrument, or the residue, or any part of the residue, of such personal estate, to or for the benefit of any person or persons entitled to such legacy, or any part thereof, or to such residue, or any part thereof, without taking such receipt or discharge in writing as aforesaid, and causing the same to be stamped within the time hereby allowed for stamping the same, shall forfeit and lose the sum of ten pounds per centum on the sum of money, or the value of the property if not money, for which such receipt or discharge ought to have been given in pursuance of this Act; and all and every person or persons receiving or taking the benefit of any such money, or other property, without giving a written receipt or discharge for the same, in which the duty payable in respect thereof shall be expressed to have been allowed or paid to the person or persons to whom such receipt or discharge shall be given, and which shall bear date on the day of signing the same, shall forfeit and lose the sum of ten pounds per centum on the sum of money, or on the value of the property, so received or taken.

XXIX. And be it further enacted(*u*), That every such receipt or discharge shall be brought, within the space of twenty-one days after the date thereof, to the said head office of the said Commissioners, or to some other office to be appointed by the said Commissioners for such purpose, to be stamped, paying the duty for the same, and upon such payment either at the said head office, or at any other office to be appointed as aforesaid, the Receiver-General or other proper officer to be appointed for that purpose by the said Commissioners, as the case shall require, shall write upon such receipt or discharge an acknowledgment of the payment of the duty so paid in words at length, and bearing date the day on which such payment shall be made, and shall subscribe his name thereto, and

(*u*) The stringency of this enactment mitigated by 48 Geo. III. c. 149, § 44 *infra*.

enter an account thereof in a book or books to be provided for that purpose, to the intent that he may be thereby charged with the sum so paid; and in case the duty shall be so paid at the said head office, then the receipt or discharge so brought to be stamped shall be forthwith stamped with one of the said four stamps as the case shall require; and in case the duty shall be so paid at any other office to be appointed by the said Commissioners as aforesaid, the receipt or discharge whereon such acknowledgment of the payment of duty shall be so written and subscribed shall be transmitted within the space of twenty-one days from the day of payment of such duty to the said head office to be stamped, and the same shall be stamped accordingly with one of the said four stamps as the case shall require; and in case the person or persons paying such duty at any such office to be appointed as aforesaid shall be desirous that the same should be transmitted to the said head office by the officer to whom such duty shall be paid, and shall leave the same with such officer for such purpose, such officer shall thereupon sign and deliver an acknowledgment that such receipt or discharge has been left with him for such purpose, and shall transmit such receipt or discharge to such head office to be stamped as aforesaid, and the same shall be sent again to such officer as soon as conveniently may be after the stamping thereof; and such officer shall deliver back the same to the person or persons entitled thereto, upon re-delivery to him of the acknowledgment which he shall have given for the same: Provided always, that if any such receipt or discharge shall not be so brought to any such office as aforesaid, within such space of twenty-one days as aforesaid, it shall nevertheless be lawful to carry such receipt or discharge to the said head office to be stamped in like manner, within three calendar months after the date thereof, paying the duty for the same, and also the further sum of ten pounds per centum on such duty, by way of penalty for not having before paid such duty, on payment of which duty and penalty, the said Commissioners are hereby authorised and required to stamp such receipt or discharge, in the same manner as if the same had been brought to the said office within the space of twenty-one days from the date thereof; but the said Commissioners, or any of their officers, shall not, on any pretence whatever, except as hereinafter directed, stamp any vellum, parchment, or paper, upon which any receipt or discharge for any legacy, or part of legacy, or any residue of any personal estate, or any part thereof, shall be written or signed with the said new stamps, or any of them, unless the duty for the same shall be paid, and such receipt or discharge shall be produced to be so stamped in manner aforesaid, within the times and in the manner hereinbefore respectively limited and appointed.

XXX. And be it further enacted, That if it shall appear to the satisfaction of the said Commissioners of Stamp Duties, upon oath or affirmation, to be administered by a justice of the peace or Master or Masters Extraordinary in Chancery, which oath or affirmation such persons are hereby empowered to administer, that less duty has been paid for any legacy, or residue, or part of residue, than ought to have been paid for the same, by mistake, without any intention to defraud; and if application shall be made to the said Commissioners to rectify such mistake, and accept the duty really due before any suit shall be instituted concerning the same, and within three calendar months after payment of the money actually paid instead of the just duty, it shall be lawful for the said Commissioners to accept the difference between the money paid and the just duty, together with the sum of ten pounds per centum on such difference, by way of penalty, in full for the just duty, and which shall be in discharge of all penalties incurred by non-payment of such duty, and to cause an acknowledgment of the payment of the just duty to be written on the receipt or discharge given for such legacy or residue or part of residue, and to be subscribed by the proper officer, and also to cause such receipt or discharge to be properly stamped if necessary, in the same manner as would have been done if the just duty had been originally paid.

XXXI. Provided always, and be it further enacted, That the party or parties paying or satisfying any legacy, or any residue of any personal estate, or any part of such residue, or receiving the same, contrary to the provisions of this Act, who shall, within the space of twelve calendar months after the offence committed, discover the other party or parties offending therein, so that such party or parties so discovered be thereupon convicted, such person so discovering shall be indemnified and discharged from all penalties incurred for any offence against this Act.

XXXII. Provided always, and be it further enacted(*v*), That where, by reason of the infancy, or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of this Act, the person or persons having or taking the burthen of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue, or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy or residue, or any part or parts thereof respectively, or any sum or sums of money on account thereof,

(*v*) This section amended by 37 Geo. III. c. 135 *infra*.

after deducting the duty chargeable thereon, into the Bank of England, with the privity of the Accountant-General of the Court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid; for payment of which money the said Accountant-General shall give his certificate as usual in such cases, on production of the certificate of the Commissioners of Stamps, that the duty thereon has been duly paid; and such payment into the bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid; and such money when paid in shall be laid out by the said Accountant-General, without any formal request for that purpose, in the purchase of three pounds per centum consolidated annuities, which with the dividends thereon shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery, by petition or motion, in a summary way: Provided always, that if it shall afterwards appear that such money, or any part thereof, has been improperly paid into the bank as aforesaid, it shall also be lawful for the said Court of Chancery, upon petition, in a summary way to dispose thereof, and of the annuities purchased therewith, and the dividends received thereon, in such manner as justice shall require: Provided also, that if it shall appear that the duty paid in respect of any such sum of money was more than ought to have been paid, it shall be lawful for the person or persons who shall have paid such duty to apply to the said Commissioners for Management of the Stamp Duties to repay such excess of duty; and the said Commissioners are hereby authorised, upon such application, to repay such excess of duty to the person or persons who shall appear to them entitled to receive the same, or to pay such excess of duty into the bank, with the privity of the said Accountant-General, for the benefit of the person or persons entitled, there to be placed to the same account, and to be applied in the same manner as the same would have been applicable, if paid together with the remainder of the legacy or sum of money in respect of which the same shall have been paid; and the said Commissioners are hereby authorised to make such payments respectively out of the moneys in their hands arising from duties imposed by this Act; and if the duty paid to the said Commissioners shall appear to be less than the duty which ought to have been paid, it shall be lawful for the person or persons who paid such money into the bank as aforesaid upon payment of the full duty to the said Commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, to apply to the Court of Chancery, in a summary way, for the repayment of the further sum paid to the said Commissioners

for such duty, out of the money in the bank so paid in by such person or persons, or the produce thereof, which payment the said Court is hereby authorised to order.

XXXIII. And be it further enacted(*w*), That if at the end of two years after the death of any person deceased, it shall appear, to the satisfaction of the said Commissioners of Stamp Duties, that it will require time to collect the debts or effects of such person then outstanding, or that from circumstances it will be difficult to ascertain or adjust the amount of the clear residue of the personal estate of such person liable to duty, and the parties interested therein shall be desirous of compounding for the duty thereon, it shall be lawful for such parties respectively, with the consent of the Commissioners of Stamp Duties, to make application to the Court of Exchequer at Westminster, if the deceased person resided in England or elsewhere, except in Scotland, and to the Court of Exchequer in Scotland, if the deceased resided in Scotland, for leave to compound such duty, stating upon oath the particulars of the personal estate for which such composition shall be proposed to be made, by affidavit to be filed in the said Court, and declaring at the same time upon oath, whether any other property of the deceased then outstanding besides the property for which such composition shall be proposed to be made hath come to the knowledge of the said parties, or any of them, and the nature thereof, and the circumstances attending the same; and in such case it shall be lawful for the said Court of Exchequer in England or Scotland, as the case may be, to appoint a proper person to set a value on the personal estate, or such part thereof, for which no duty shall have been charged, and which shall be specified in such affidavit as the property for which such composition shall be desired, and to adjust and settle the duty which, justly and equitably under all circumstances, ought to be paid in respect of such personal estate so specified, and thereupon it shall be lawful for the said Commissioners, and they are hereby required, if the said Court of Exchequer to which such application shall be made shall confirm the said adjustment and settlement, and order the duty to be accepted accordingly, and by authority of such order to accept payment of the sum so adjusted and settled, in full discharge of the duty on so much of such personal estate as shall be so specified, and according to such order, and to enter the same in their books accordingly, and to grant certificates thereof, expressing the receipt of such duty by way of composition under such order; and every such person to whom such certificate shall be granted, and every future representative of the same estate, and all persons entitled to the benefit of the property

(*w*) See 16 & 17 Vict. c. 51, § 39; also 43 Vict. c. 14, § 11; 44 Vict. c. 12, § 43.

for which such composition shall be so paid, shall be discharged from any further payment of duty on the same; and in all future payments of such property it shall be lawful for the persons having or taking the burthen of the execution of any will or testamentary instrument disposing such property, or the administration thereof, to pay, apply, and dispose of the same, and for all persons entitled to the benefit thereof to receive the same, without having the receipts and discharges in writing, hereby required to be given and taken for the same, stamped as hereinbefore directed; provided such receipts or discharges shall express the same to be given under the authority of such composition as aforesaid, and not liable to duty: Provided always nevertheless, that the duty shall be charged and paid upon all and every part of the personal estate of such person deceased, other than that which shall be specified in such affidavit as aforesaid, and included in the valuation in which such composition shall have been made as aforesaid, and for which the said Court of Exchequer shall allow and order such composition to be taken as aforesaid, in the same manner as if no such composition had been made; and all and every person and persons shall be liable to all the like penalties and forfeitures for not duly paying the duty for such personal estate not compounded for, and subject to the like rules, methods, and directions for charging such duty, as such person and persons respectively would be liable to if such composition had not been made.

XXXIV. And be it further enacted, That if at any time after payment of duty on any legacy, or residue or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person by whom any legacy or part of legacy, or any residue of any personal estate hath been received or retained, shall be obliged to refund the same or any part thereof, then in every such case it shall be lawful for the said Commissioners of Stamp Duties, and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, to settle and adjust the amount of such over-payment, and to repay the same out of the money in their hands, arising from the duties by this Act imposed, or to allow the same in future payments, as the case may permit or require.

XXXV. And be it further enacted, That whenever any person or persons having or taking the burthen of the execution of any will or testamentary instrument, or the administration of any personal estate as aforesaid, shall be entitled to any legacy, or the residue or any

part of the residue, of the personal estate of any testator, testatrix, or intestate, such person shall be chargeable with the duty whenever he, she, or they shall be entitled, in the due course of administration, to retain to his, her, or their own use any part of the said estate, in satisfaction of such legacy or residue, or any part thereof; and every such person, before any such retainer, shall transmit to the said Commissioners of Stamp Duties, or their officers, a note containing the particulars of such legacy, residue or part of residue, intended to be retained, and the amount or value thereof, and the duty which such person or persons shall offer to pay thereon; and the said Commissioners shall charge and assess the duty thereon, in such manner as the duty shall be chargeable thereon by virtue of the provisions in this Act contained, and such duty shall be paid accordingly; and on payment of the said duty, the said Receiver-General of the said duty, or officer appointed to receive the same, shall, at the foot of a duplicate of the said assessment, duly stamped in such manner as the said Commissioners shall direct for such purpose, give a receipt for such duty in such form of words as the said Commissioners shall direct, which receipt shall be a discharge for the duty expressed therein; and in case any such person or persons shall neglect to pay such duty as aforesaid, within fourteen days after the same ought to have been paid as aforesaid, every such person and persons shall forfeit and pay treble the value of the duty which ought to have been paid.

XXXVI. Repealed by 35 & 36 Vict. c. 63, 1872.

XXXVII. And be it further enacted, That if the authority under or by colour of which any person shall have administered the estate or effects of any person deceased, or any part thereof, shall be void, or be repealed, or declared void, and such person shall, before the avoidance, repeal, or declaration of avoidance, have paid any duty hereby imposed, or any duty imposed by any of the said former Acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof to the satisfaction of the said Commissioners of Stamp Duties, be repaid to the person or persons who shall have paid the same, or his, her, or their representatives, by the said Commissioners, out of any moneys in their hands arising from the duties imposed by this Act or the said former Acts; but in case such duty ought to have been paid by the rightful executor or executors, administrator or administrators, of such deceased person, then and in such case the payment of such duty shall be valid and effectual notwithstanding such avoidance, repeal, or declaration of avoidance as aforesaid; and no such

person shall, by reason of the avoidance, repeal, or declaration of avoidance of such authority be sued, molested, or troubled for or in respect of such payment, but all such payments in respect of the said duty shall be allowed in account with such rightful executor or executors, administrator or administrators, and the same shall be deemed payments in the due course of administration, as fully and effectually as if such payments had been made by rightful executors or administrators; any law, usage, or custom to the contrary notwithstanding.

XXXVIII. And be it further enacted, That if any person or persons, upon any oath or affirmation before the said Commissioners of Stamp Duties, or Commissioners of Land Tax, or any person or persons authorised by this Act to administer any such oath or affirmation, shall wilfully and corruptly swear, affirm, or allege any matter or thing which shall be false or untrue, with intent to defraud his Majesty of any of the said duties hereby imposed, or with intent to charge any person or persons with any greater or other duty than such person or persons ought to be charged with, every such person or persons so offending, and being thereof duly convicted, shall be and is and are hereby declared to be subject and liable to such pains and penalties as by any law now in being any person convicted of wilful and corrupt perjury is subject and liable to.

XXXIX. And be it further enacted, That if any person shall alter any word, letter, figure, or number in any assessment or receipt to be made or given in pursuance of this Act, for any of the said duties, after the same shall have been signed by the officer appointed to sign the same according to the directions of this Act, or shall utter or publish as true any such altered assessment or receipt, with intent to defraud his Majesty, his heirs or successors, or any other person or persons, then and in such case every person so altering, uttering, or publishing as aforesaid shall forfeit and pay the sum of five hundred pounds.

XL. Repealed by 34 & 35 Vict. c. 116 (1871).

XLI. Provided always, and be it further enacted, That every receipt or discharge for any legacy or any part of any legacy, or for any residue or part of residue, of any personal estate, which shall be duly stamped as required by this Act, shall be free and discharged from all stamp duties imposed by the said recited Acts or by any other Act of Parliament upon receipts or discharges for money; and that every such receipt or discharge which shall be duly stamped as required by the said recited Acts, and upon which no new duty is imposed by this Act, shall be also free and discharged from any stamp duty imposed by any other Act upon receipts or discharges for money.

XLII. Repealed by 35 & 36 Vict. c. 63 (1872).

XLIII. Repealed in effect by 31 & 32 Vict. c. 124 (1868).

XLIV. Provided always, and be it further enacted, That in default of prosecution within the time hereinbefore limited, no such penalty or forfeiture shall be afterwards recoverable, except in the name of his Majesty's Attorney-General in England, and of his Majesty's Advocate in Scotland, by information in the Court of Exchequer in England or Scotland respectively, in which case the whole of such penalty or forfeiture shall belong to his Majesty, his heirs and successors; and that all penalties and ferfeitures, and shares of penalties and forfeitures, incurred as aforesaid belonging to his Majesty, his heirs or successors, shall be paid into the hands of the Receiver-General of his Majesty's Stamp Duties for the time being, any law, usage, or custom to the contrary notwithstanding; and that in all cases where the whole of such pecuniary penalties or forfeitures shall be recovered to the use of his Majesty, his heirs or successors, it shall be lawful for the said Commissioners to cause such reward as they shall think fit, not exceeding one moiety of such penalty or forfeiture so recovered, after deducting all charges and expenses incurred in recovering the same, to be paid thereout to or amongst any person or persons who shall appear to them entitled thereto as informers, in respect of such penalties or forfeitures so recovered; anything herein contained to the contrary notwithstanding.

XLV., XLVI. Repealed by 34 & 35 Vict. c. 116 (1871).

XLVII. And be it further enacted, That if any action or suit shall be brought or commenced against any person or persons for any thing done in pursuance of this Act, then, and in every such case, the said action or suit shall be commenced within six calendar months after the fact committed, and not afterwards, and shall be brought in the county or place where the cause of action shall arise, and not elsewhere; and the defendant or defendants in such action or suit to be brought may plead the general issue, and give this Act and the special matter in evidence, at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this Act; and if it shall appear to be so done, or if any such action or suit shall be brought after the time before limited for bringing the same, or shall be brought in any other county, city or place than as aforesaid, then, and in every such case, the jury shall find for the defendant or defendants; and if upon such verdict, or if the plaintiff or plaintiffs shall become nonsuited, or discontinue his, her, or their action, or if a verdict shall pass against the plaintiff or plaintiffs, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble

costs, and have the like remedy for the same as any defendant or defendants hath or have for costs of suit in other cases by law.

Note.—The 34 & 35 Vict. c. 116 (1871) repeals, except as far as regards annuities, the duties on which become payable on or *before* 19th May, 1853 (the date of the Succession Act, 1853), so much of the Schedule annexed to this Act as contains tables of the values of annuities and rules for inferring the values of annuities.

XXVIII.—37 *Geo. III. c.* 135.—[20*th July*, 1797.]

Provides that where money is paid into the Bank of England in pursuance of § 32 of 36 Geo. III. c. 52, the Accountant-General's certificate shall be a warrant to the bank for payment of such money.

XXIX.—39 *Geo. III. c.* 73.—[1799.]

Provides (§ 1) that no legacy of books, prints, pictures, &c., bequeathed to any body corporate, &c., for the purpose of being preserved, shall be liable to any duty.(*a*)

XXX.—*An ACT for granting to his Majesty additional Stamp Duties in Great Britain on certain Legacies,* 45 *Geo. III. c.* 28.—[5*th April*, 1805.]

The following is the arrangement of this Act:—

Section 1. Duties upon legacies for the benefit of children or their descendants.

Duty upon legacies out of heritable estates, and which, if payable out of personal estates, would be liable to the duties of $2\frac{1}{2}$, 4, and 5 per cent. under 44 Geo. III. c. 98.

(*a*) § 2 of this Act repealed by 34 & 35 Vict. c. 116 (1871).

Duty upon legacies out of personal estates for which a duty of 8 per cent. payable.

Duty upon legacies out of heritable estates, and which, if payable out of personal estates, would be liable to a duty of 8 per cent.

Section 2. Duties not payable on legacies paid out of the estate of persons dying before 5th April, 1805.

„ 3. Duties not payable on legacies to the husband or wife of the deceased, or to the Royal Family.

„ 4. What deemed a legacy under the Act.

„ 5. Duties on legacies charged on heritable estate to be paid by the trustees, or the persons entitled to such estate. See also § 6 of 36 Geo. III. c. 52; and § 44 of 16 & 17 Vict. c. 51.

„ 6. Duties to be under the management of the Commissioners for Stamps.—See § 26 of 44 Vict. c. 12 *infra*.

„ 7. Duties on legacies granted by 44 Geo. III. c. 98, and this Act, to be levied according to the provisions of 36 Geo. III. c. 52.

„ 8. Persons counterfeiting stamps, &c., guilty of felony.

„ 9. Powers of recited Act 36 Geo. III. c. 52, or of any Act relating to stamps, to extend to this Act.

„ 10. Application of duties.

„ 11. Separate accounts of duties to be kept.

„ 12. Limitation of actions.

„ 13. Alteration or repeal of Act.

The whole of these sections have been repealed by the Act 35 & 36 Vict. c. 63 (1872), with the exception of section 5; section 7, from "all the provisions" to the end of it; and section 12. These unrepealed enactments are as follows :—

* * * * * *

V. And be it further enacted(*a*), That the duties hereby granted upon legacies, or charged upon or made payable out of any real estate(*b*), or out of any moneys to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such moneys, shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised, out of which the legacy or

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(*a*) This section provides for the cases of—(1) an annuity payable out of heritable estate; (2) a legacy charged on heritable estate; (3) a bequest of heritable estate to be sold and the proceeds to be divided.

(*b*) The corresponding words in 55 Geo. III. c. 184, schedule, Part iii. *infra*, are "out of or charged upon his or her real or personal estate."

legacies, or share or shares, of any money arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied, or if there shall be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy, or by the person or persons empowered or required to pay or satisfy any such legacy; and the said duties shall be retained by the person paying or satisfying any such legacy or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in an Act passed in the thirty-sixth year of the reign of his present Majesty, intituled, An Act for repealing certain Duties on Legacies and Shares of Personal Estates, and for granting other Duties thereon in certain Cases.

* * * * * *

VII. And be it further enacted(*a*), that . . . all the provisions, clauses, regulations, penalties, forfeitures, matters, and things in the said Act contained in relation to legacies out of personal estates, or to the collecting any duties thereon, or valuation of any annuities or periods of paying the duties thereon, by instalments or otherwise, shall, so far as the same can be made applicable, and in all cases not expressly provided for by this Act, extend to and be put in force in relation to legacies, annuities, and shares of money arising or to arise out of any real estate, and all directions, provisions, forfeitures, and penalties in the said Act contained, as to executors and administrators, shall be applied to all trustees and owners of any real estates, chargeable with legacies, annuities, or shares of money, or out of which, or any money to arise therefrom [against] any such legacies, annuities, or shares of money, shall be to be satisfied as fully and amply as if all such provisions, clauses, regulations, penalties, forfeitures, matters, and things, had been repeated and re-enacted in this Act, in relation to legacies, annuities, and shares of money arising or to arise out of any real estate.

* * * * * *

XII. [This section being in the identical words of § 47 of 36 Geo. III. c. 52 *supra*, is omitted.]

XXXI.—48 *Geo. III. c.* 149.—[1808.]

§§ 1 TO 34, both inclusive, repealed by 33 & 34 Vict. c. 99 (1870).

The unrepealed sections of this Act provide substantially as follows:—

(*a*) See 36 Geo. III. c. 52, § 19; and 16 & 17 Vict. c. 51, § 30.

That (§ 35) probates of wills and letters of administration shall be valid as to trust property, although the value thereof be not covered by the stamp duty.

That (§ 36) where executors, &c., allege that any property was vested in the deceased as a trustee, a special affidavit may be required of the facts, in which affidavit certain particulars must be given (§ 37).

That (§ 38) executors and others intromitting with the effects in Scotland of any person dying after 10th October, 1808, must exhibit any inventory thereof in the Commissary Court there, duly stamped, and an additional inventory must be given, under a penalty of £20 on discovering other effects.

That (§ 39) the Clerk of Court shall transmit such inventories when recorded to the Solicitor of Stamps at Edinburgh.

That (§ 40) additional inventories must specify the amount of the effects in former inventories, and the stamp duty to be according to the total of both; and the duty on the former to be repaid. See 16 & 17 Vict. c. 59 § 8, *infra.*

That (§ 41) the duty on any inventory shall be charged only in respect of effects in Scotland. This section altered, see § 158 *supra.*

That (§ 42) confirmations shall not be granted for effects not included in the inventory, and executors shall not be entitled to recover effects not in the confirmation.

§ 43 repealed by 35 & 36 Vict. c. 63 (1872).

That (§ 44) the Commissioners may in other cases stamp receipts for legacies brought after three months from the date thereof, on payment of duty and penalty, and may remit penalty if receipt signed out of Great Britain.

§ 45 repealed by 33 & 34 Vict. c. 99 (1870).

§§ 46, 47 repealed by 35 & 36 Vict. c. 63 (1872).

§§ 48, 49 repealed by 33 & 34 Vict. c. 99 (1870).

XXXII.—*An ACT for repealing the Stamp Duties on Deeds, Law Proceedings, and other written or printed Instruments, and the Duties on Fire Insurances, and on Legacies and Successions to Personal Estate upon Intestacies, now payable in Great Britain; and for granting other Duties in lieu thereof,* 55 *Geo. III. c.* 184.—[11*th July,* 1815.]

The following is the arrangement of this Act:—

Section 1. Repeals duties granted by 48 Geo. III. c. 149. This section is repealed by 33 & 34 Vict. c. 99, 1870.

„ 2. Duties specified in schedule annexed to the Act to be levied. This section is repealed by 33 & 34 Vict. c. 99, 1870, except so far as it relates to the duties contained in the *third* part of the schedule, and to licenses to bankers and pawnbrokers. And the whole Act is afterwards repealed, so far as it relates to licenses to pawnbrokers, by 35 & 36 Vict. c. 93, § 4, 1872.

„ 3. to 20, both inclusive, are repealed by 33 & 35 Vict. c. 99, 1870.

„ 21. Enacts that the Bank of England shall pay a composition for the duties on their bills and notes.

„ 22. Enacts that a new composition shall be made when the bank resumes cash payments.

„ 23. Repealed by 37 & 38 Vict. c. 35, 1874.

„ 24. Enacts that re-issuable notes are not to be issued by bankers or others without a license.

„ 25, 26. Repealed by 36 & 37 Vict. c. 91, 1873.

„ 27. Enacts that bankers applying for licenses shall deliver specimens of their notes, &c.

„ 28. Enacts that licenses shall continue in force notwithstanding alteration in partnerships.

„ 29, 30, 31. Repealed by 33 & 34 Vict. c. 99, 1870.

„ 32 to 36, both inclusive, repealed by 32 & 33 Vict. c. 14, 1869.

„ 37. Penalty for taking possession of personal estate without a title.

„ 38. Courts not to grant title without affidavit of value of estate.

„ 39. Affidavits to be free from stamp duties, and to be sent to Commissioners of Stamps.—See § 9 of 43 Vict. c. 14, and § 29 of 44 Vict. c. 12, *infra.*

„ 40. Provision for the case of too high a stamp duty being paid on probates, &c.

„ 41. Provision for the case of too little stamp duty being paid on probates, &c.

„ 42. Administrator to give security.

„ 43. Penalty on executors, &c., not paying full duty in a given time after discovery of too little duty paid at first.

„ 44. Courts not to take surrenders of probates, &c., on the ground only of wrong duty paid thereon.

„ 45. Commissioners of Stamps may give credit for the duty on probates, &c., in certain cases.

Section 46. Commissioners may extend the credit if necessary.
„ 47. Probate, &c., stamped on credit to be deposited with the Commissioners.
„ 48. Duty for which credit shall be given to be debt to the Crown.
„ 49. Provision for the case of letters of administration *de bonis non* taken out before payment of the duty, for which credit shall be given.
„ 50. Directions concerning affidavits by executors, &c., residing out of England relating to trust property.
„ 51. A return of duty on inventories, &c., to be made in respect of debts if claimed in three years. This section is now superseded by 5 & 6 Vict. c. 79, § 23; 23 & 24 Vict. c. 80, § 6; and 44 Vict. c. 12, § 28 *infra*.
„ 52. Affidavits relating to stamp duties, if no express provision, to be made before Commissioners, &c.
„ 53. Penalty for perjury.
„ 54. Exempts confectionery from stamp duty.
„ 55. The duties to be paid to the Receiver-General and by him into the Exchequer.
Schedule: Part the Third.

The unrepealed sections bearing on the subject of the present work are as follows:—

II. And be it further enacted(*a*), That there shall be raised, levied, and paid into and for the use of His Majesty, his heirs and successors, in and throughout the whole of Great Britain, for and in respect of the several instruments, matters and things mentioned and described in the schedule hereunto annexed (except those standing under the head of exemptions), or for or in respect of the vellum, parchment, or paper upon which such instruments, matters and things or any of them, shall be written or printed, the several duties or sums of money set down in figures against the same respectively, or otherwise specified and set forth in the same schedule; and that the yearly percentage duty on insurances from loss by fire therein mentioned shall commence and take place from and after the 28th day of September, 1815, and that all the other duties therein mentioned shall commence and take place from and after the 31st day of August, 1815; and that the said schedule, and all the provisions, regulations and directions therein contained with respect to the said duties, and the instruments, matters and things charged there-

(*a*) This section is repealed by 33 & 34 Vict. c. 99 (1870), except so far as it relates to the duties contained in the third part of the schedule below, p. 454.

with, shall be deemed and taken to be part of this Act, and shall be read and construed, as if the same had been inserted herein at this place, and shall be applied, observed, and put in execution accordingly.

* * * * * *

XXXVII. And for better securing the duties on probates of wills and letters of administration, be it further enacted, That from and after the thirty-first day of August, one thousand eight hundred and fifteen, if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased, every person so offending shall forfeit the sum of one hundred pounds(*b*), and also a further sum at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the will or letters of administration of the estate and effects of the deceased.

XXXVIII. And be it further enacted, That from and after the expiration of three calendar months from the passing of this Act, no Ecclesiastical Court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit(*c*), or solemn affirmation in the case of Quakers, that the estate and effects of the deceased for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting anything on account of the debts due and owing from the deceased(*d*), are under the value of a certain sum to be therein specified, to the best of the deponent's or affirmant's knowledge, information, and belief, in order that the proper and full stamp duty may be paid(*e*) on such probate

(*b*) See § 43 of this Act, and § 28 of 36 Geo. III. c. 52.

(*c*) See § 42 of 48 Geo. III. c. 149 *supra*, as to confirmations in Scotland.

(*d*) Debts may now be deducted.—§ 155 *supra*.

(*e*) See 21 & 22 Vict. c. 56, as to including English and Irish estates in inventory. Certificate of Sheriff as to domicile now unnecessary.—39 & 40 Vict. c. 70, § 41 See also § 233 *supra*, as to sealing confirmations in England.

or letters of administration; which affidavit or affirmation shall be made before the Surrogate or other person, who shall administer the usual oath for the due administration of the estate and effects of the deceased.

XXXIX. And be it further enacted, That every such affidavit or affirmation shall be exempt from stamp duty, and shall be transmitted to the said Commissioners of Stamps, together with a copy of the will, or extract, or account of the letters of administration to which it shall relate, by the registrar or other officer of the court, whose duty it shall be to transmit copies of wills and extracts, or accounts of letters of administration, to the said Commissioners for the better collection of the duties on legacies and successions to personal estate upon intestacy; and if any registrar or other officer whose duty it shall be shall neglect to transmit such affidavit or affirmation to the said Commissioners of Stamps as hereby directed, every person so offending shall forfeit the sum of fifty pounds.

XL. And be it further enacted, That from and after the passing of this Act, where any person on applying for the probate of a will or letters of administration(*f*) shall have estimated the estate and effects of the deceased to be of greater value than the same shall have afterwards proved to be, and shall in consequence have paid too high a stamp duty thereon, if such person shall produce the probate or letters of administration to the said Commissioners of Stamps within six calendar months after the true value of the estate and effects shall have been ascertained, and it shall be discovered that too high a duty was first paid on the probate or letters of administration, and shall deliver to them a particular inventory and account, and valuation of the estate and effects of the deceased, verified by an affidavit, or solemn affirmation in the case of Quakers; and if it should thereupon satisfactorily appear to the said Commissioners that a greater stamp duty was paid on the probate or letters of administration than the law required, it shall be lawful for the said Commissioners to cancel or expunge the stamp on the probate or letters of administration, and to substitute another stamp for denoting the duty which ought to have been paid thereon, and to make an allowance for the difference between them, as in the cases of spoiled stamps, or, if the difference be considerable, to repay the same in money, at the discretion of the said Commissioners.

XLI. And be it further enacted, That from and after the passing of this Act, where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects

(*f*) See as to additional inventory, 16 & 17 Vict. c. 59, § 8; also § 172 *supra*. See also 44 Vict. c. 12, § 31 *infra*.

of the deceased to be of less value than the same shall have afterwards proved to be, and shall in consequence have paid too little stamp duty thereon, it shall be lawful for the said Commissioners of Stamps, on delivery to them of an affidavit(*g*) or solemn affirmation of the value of the estate and effects of the deceased, to cause the probate or letters of administration to be duly stamped on payment of the full duty which ought to have been originally paid thereon in respect of such value, and of the further sum or penalty(*h*) payable by law for stamping deeds after the execution thereof, without any deduction or allowance of the stamp duty originally paid on such probate or letters of administration: Provided always, that if the application shall be made within six calendar months after the true value of the estate and effects shall be ascertained(*i*), and it shall be discovered that too little duty was at first paid on the probate or letters of administration, and if it shall appear by affidavit or solemn affirmation to the satisfaction of the said Commissioners that such duty was paid in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, and without any intention of fraud, or to delay the payment of the full and proper duty, then it shall be lawful for the said Commissioners to remit the beforementioned penalty, and to cause the probate or letters of administration to be duly stamped, on payment only of the sum which shall be wanting to make up the duty which ought to have been at first paid thereon.

XLII. Provided always, and be it further enacted, That in cases of letters of administration on which too little stamp duty shall have been paid at first, the said Commissioners of Stamps shall not cause the same to be duly stamped in the manner aforesaid, until the administrator shall have given such security to the Ecclesiastical Court or Ordinary by whom the letters of administration shall have been granted as ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained, and also that the said Commissioners of Stamps shall yearly or oftener transmit an account of the probates and letters of administration upon which the stamps shall have been rectified in pursuance of this Act to the several Ecclesiastical Courts by which the same shall have been granted, together with the value of the estate and effects of the deceased upon which such rectification shall have proceeded.

(*g*) As to forms of affidavit, see §§ 174, 177 *supra*. See also 44 Vict. c. 12, § 32 *infra*.

(*h*) See §§ 28, 35 of 36 Geo. III. c. 52.

(*i*) On failure, penalty imposed by § 43 of this Act.

XLIII. And be it further enacted, That where too little duty shall have been paid on any probate or letters of administration, in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, if any executor or administrator acting under such probate or letters of administration shall not, within six calendar months(*k*) after the passing of this Act, or after the discovery of the mistake or misapprehension, or of any estate or effects not known at the time to have belonged to the deceased, apply to the said Commissioners of Stamps, and pay what shall be wanting to make up the duty which ought to have been paid at first on such probate or letters of administration, he or she shall forfeit the sum of one hundred pounds(*l*), and also a further sum at and after the rate of ten pounds per centum on the amount of the sum wanting to make up the proper duty.

XLIV. And be it further enacted, That from and after the expiration of three calendar months from the passing of this Act it shall not be lawful for any Ecclesiastical Court or person to call in and revoke or to accept the surrender of any probate or letters of administration, on the ground only of too high or too low a stamp duty having been paid thereon, as heretofore hath been practised(*m*); and if any Ecclesiastical Court or person shall so do, the Commissioners of Stamps shall not make any allowance whatever for the stamp duty on the probate or letters of administration which shall be so annulled.

XLV. And whereas it has happened in the case of letters of administration on which the proper stamp duty hath not been paid at first, that certain debts, chattels, real or other effects due or belonging to the deceased have been found to be of such great value that the administrator hath not been possessed of money sufficient, either of his own or of the deceased, to pay the requisite stamp duty, in order to render such letters of administration available for the recovery thereof by law: And whereas the like may occur again, and it may also happen that executors or persons entitled to take out letters of administration may, before obtaining probate of the will or letters of administration of the estate and effects of the deceased, find some considerable part or parts of the estate and effects of the deceased so circumstanced as not to be immediately got possession of, and may not have money sufficient, either of their own or of the deceased, to pay the stamp duty on the probate or letters of

(*k*) See § 41 of this Act.
(*l*) Personal penalty, likely penalty imposed by § 37 of Act.
(*m*) See §§ 40, 41 of this Act.

administration which it shall be necessary to obtain : Be it therefore further enacted, That from and after the passing of this Act it shall be lawful for the said Commissioners of Stamps, on satisfactory proof of the facts by affidavit or solemn affirmation in any such case as aforesaid which may appear to them to require relief, to cause the probate or letters of administration to be duly stamped for denoting the duty payable or which ought originally to have been paid thereon, and to give credit for the duty, either upon payment of the before-mentioned penalty, or without, in cases of probates or letters of administration already obtained, and upon which too little duty shall have been paid, and either with or without allowance of the stamp duty already paid thereon, as the case may require, under the provisions of this Act; provided in all such cases of credit that security be first given by the executors or administrators, together with two or more sufficient sureties to be approved of by the said Commissioners, by a bond to his Majesty, his heirs or successors, in double the amount of the duty, for the due and full payment of the sum for which credit shall be given, within six calendar months or any less period, and of the interest for the same at the rate of ten pounds per centum per annum from the expiration of such period until payment thereof, in case of any default of payment at the time appointed; and such probate or letters of administration, being duly stamped in the manner aforesaid, shall be as valid and available as if the proper duty had been at first paid thereon and the same had been stamped accordingly.

XLVI. Provided always, and be it further enacted, That if at the expiration of the time to be allowed for the payment of the duty on such probate or letters of administration it shall appear to the satisfaction of the said Commissioners that the executor or administrator to whom such credit shall be given as aforesaid shall not have recovered effects of the deceased to an amount sufficient for the payment of the duty, it shall be lawful for the said Commissioners to give such further time for the payment thereof, and upon such terms and conditions, as they shall think expedient.

XLVII. Provided also, and be it further enacted, That the probate or letters of administration so to be stamped on credit as aforesaid shall be deposited with the said Commissioners of Stamps, and shall not be delivered up to the executor or administrator until payment of the duty, together with such interest as aforesaid, if any, shall become due; but the same shall nevertheless be produced in evidence by some officer of the Commissioners of Stamps at the expense of the executor or administrator, as occasion shall require.

XLVIII. And be it further enacted, That the duty for which

credit shall be given as aforesaid shall be a debt to his Majesty, his heirs or successors, from the personal estate of the deceased, and shall be paid in preference to and before any other debt whatsoever due from the same estate; and if any executor or administrator of the estate of the deceased shall pay any other debt in preference thereto, he or she shall not only be charged with and be liable to pay the duty out of his or her own estate, but shall also forfeit the sum of five hundred pounds.

XLIX. And be it further enacted, That if before payment of the duty for which credit shall be given in any such case as aforesaid it shall become necessary to take out letters of administration *de bonis non* of the deceased, it shall also be lawful for the said Commissioners to cause such letters of administration *de bonis non* to be duly stamped with the particular stamp provided to be used on letters of administration of that kind for denoting the payment of the duty in respect of the effects of the deceased on some prior probate or letters of administration of the same effects, in such and the same manner as if the duty had been actually paid, upon having the letters of administration *de bonis non* deposited with the said Commissioners, and upon having such further security for the payment of the duty as they shall think expedient; and such letters of administration shall be as valid and available as if the duty for which credit shall be given had been paid.

L. And be it further enacted, in regard to probate of wills and letters of administration, That where any part of the personal estate which the deceased was possessed of or entitled to shall be alleged to have been trust property, if the person or persons who shall be required to make any affidavit or affirmation relating thereto, conformably to the provisions of the said Act of the forty-eighth year of his Majesty's reign(*n*), shall reside out of England, such affidavit or affirmation shall and may be made before any person duly commissioned to take affidavits by the Court of Session or Court of Exchequer in Scotland, or before one of his Majesty's justices of the peace in Scotland, or before a Master in Chancery, Ordinary or Extraordinary, in Ireland, or before any judge or civil magistrate of any other country or place where the party or parties shall happen to reside; and every such affidavit or affirmation shall be as effectual as if the same had been made before a Master in Chancery in England, pursuant to the directions of the said last-mentioned Act.

LI. [This section is now superseded by the Acts 5 & 6 Vict. c. 79, § 23; 23 & 24 Vict. c. 80, § 6; and 44 Vict. c. 12, § 28, *infra.*]

(*n*) 48 Geo. III. c. 149, §§ 35, 36, 37.

LII. And be it further enacted, That all affidavits and solemn affirmations in the case of Quakers required by this or any former or future Act of Parliament, or which shall be required by the said Commissioners of Stamps to be made, for the satisfaction of the said Commissioners, of and concerning any facts or circumstances upon which they are to execute the powers vested in them by this or any other Act, or for the verification of any accounts of or concerning the duties under their management, or for any other purpose relating to such duties, shall, in all cases not otherwise expressly provided for, be made before the said Commissioners or any one or more of them, or before a Master in Chancery, Ordinary or(*o*) Extraordinary, in England, or before any person duly commissioned to take affidavits by the Court of Session or the Court of Exchequer in Scotland, or before one of his Majesty's justices of the peace in Scotland.

LIII. And be it further enacted(*oo*), That all and every person and persons before whom any affidavit or solemn affirmation is or shall be required or directed to be made by this or any former or future Act of Parliament relating to any stamp duties, shall be, and they are hereby authorised to take the same and administer the proper oath or affirmation for that purpose; and if any person making any such affidavit or affirmation shall knowingly and wilfully make a false oath or affirmation of or concerning any of the matters to be therein specified and set forth, every person so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to.

LIV. [Omitted, as it merely exempts confectionery from stamp duty.]

LV. And be it further enacted, that all the moneys to arise from the duties by this Act, and from the several other duties under the management of the said Commissioners of Stamps, shall be paid into the hands of the Receiver-General of the stamp duties in Great Britain, who shall from time to time pay the same into the Bank of England for safe custody, pursuant to the Act in that case made and provided: and shall thereafter pay the same (after deducting the charges of raising, collecting, and accounting for the same, and all other charges first payable thereout, and with the exception of any duties on lottery licenses and shares of tickets) into the receipt of his Majesty's Exchequer at Westminster, in one sum, at such times, and in such manner as the present stamp duties are by the laws in force directed to be paid; and that the moneys so paid into the said receipt shall be carried to and made part of the consolidated fund of Great

(*o*) The words "ordinary or" repealed by 36 & 37 Vict. c. 91 (1873).
(*oo*) See §§ 38 and 39 of 36 Geo. III. c. 52 *supra*.

Britain; and the same shall be apportioned in the accounts of the consolidated fund and of the public debt of Great Britain in such manner as shall be directed by any Act of the present session of Parliament.

SCHEDULE: PART THE THIRD.

Containing the Duties on Probate of Wills and Letters of Administration; on Confirmations of Testaments, testamentary and dative; on Inventories to be exhibited in the Commissary-Courts in Scotland; and on Legacies out of Real or Personal, Heritable or Moveable Estate; and on Successions to Personal or Moveable Estates upon Intestacy.

PART THE THIRD.	Duty. £ s. d.
Probate of a will and letters of administration with a will annexed, to be granted in England;	
Confirmation(*p*) of any testament testamentary, or eik thereto, to be expeded in any commissary-court in Scotland, where the deceased shall have died before or upon the 10th day of October, 1808, and subsequent to the 10th day of October, 1804;	
(*pp*)Inventory to be exhibited and recorded in any commissary-court in Scotland of the estate and effects of any person deceased who shall have died after the 10th day of October, 1808, and have left any testament or testamentary disposition of his or her personal or moveable estate and effects, or any part thereof(*q*);	
[Here follows a long table of stamp duties, applicable to Testate Successions; but as the table has been superseded as from 1st April, 1880, by the Acts 43 Vict. c. 14, and 44 Vict. c. 12 *infra*, it is omitted.]	
Letters of administration without a will annexed, to be granted in England;	
Confirmation of any testament-dative, to be expeded in any commissary-court in Scotland, where the deceased shall have died before or upon the 10th day of October, 1808, and subsequent to the 10th day of October, 1804.	

(*p*) See § 188 *et seq.* *supra* as to confirmations.
(*pp*) See §§ 149-177 *supra* as to inventories.
(*q*) See § 156 *supra* as to new inventory duty; also § 27 of 44 Vict. c. 12.

Confirmation, &c.—*continued.* Duty. £ s. d.

Inventory to be exhibited and recorded in any commissary-court in Scotland of the estate and effects of any person deceased who shall have died after the 10th day of October, 1808, without leaving any testament or testamentary disposition of his or her personal or moveable estate or effects, or any part thereof;

[Here follows a long table of stamp duties, applicable to Intestate Successions; but as the table has been superseded by the Acts 43 Vict. c. 14, and 44 Vict. c. 12 *infra*, it is omitted.]

Exemptions from all Stamp Duties.

Probate of will, letters of administration, confirmation of testament, and eik thereto, and inventory of the effects of any common seaman, marine, or soldier who shall be slain or die in the service of his Majesty, his heirs or successors:

Additional inventory to be exhibited and recorded in any commissary-court in Scotland; where the same shall not be liable to a duty of greater amount than the duty already paid upon any former inventory exhibited and recorded of the estate and effects of the same person.

Legacies and successions to personal or moveable estate upon intestacy.

I. *Where the testator, testatrix, or intestate died before or upon the 5th day of April,* 1805.

For every legacy, specific or pecuniary, or of any other description, of the amount or value of £20 or upwards, given by any will or testamentary instrument of any person who died

Legacies, &c.—*continued.*	Duty. £ s. d.
before or upon the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815 :	
Also for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person who died before or upon the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy ; where such residue, or share of residue, shall be of the amount or value of £20 or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the thirty-first day of August, 1815 :	
Where any such legacy or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, a duty at and after the rate of two pounds and ten shillings per centum on the amount or value thereof	*per cent.* 2 10 0
Where any such legacy or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of the father or mother of the deceased, or any descendant of a	

Legacies, &c.—*continued.*	Duty. £ s. d
brother or sister of the father or mother of the deceased, a duty at and after the rate of four pounds per centum on the amount or value thereof	*per cent.* 4 0 0
Where any such legacy or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased, a duty at and after the rate of five pounds per centum on the amount or value thereof	5 0 0
And where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, a duty at and after the rate of eight pounds per centum on the amount or value thereof . . .	8 0 0
II. *Where the testator, testatrix, or intestate shall have died after the 5th day of April*, 1805.	
For every legacy, specific or pecuniary, or of any other description of the amount or value of £20 or upwards(*r*), given by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or	

(*r*) Altered by § 42 of 44 Vict. c. 12 *infra*.

Legacies, &c.—*continued.*	Duty. £ s. d.
heritable estate, or out of any moneys to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815:	
Also for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving to two or more persons), of the personal or moveable estate of any person who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue or share of residue shall be of the amount or value of £20 or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after 31st day of August, 1815:	
And also for the clear residue (when given to one person), and for every share of the clear residue (when given to two or more persons), of the moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument, of any person who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges	

Legacies, &c.—*continued.*	Duty. £ s. d.
first made payable thereout, if any), where such residue, or share of residue, shall amount to £20 or upwards, and where the same shall be paid, retained, or discharged after the 31st day of August, 1815:	
Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestor of the deceased, a duty at and after the rate of one pound per centum on the amount or value thereof . . .	*per cent.* 1 0 0
Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, a duty at and after the rate of three pounds per centum on the amount or value thereof . . .	3 0 0
Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased, a duty at and after the rate of five pounds per centum on the amount or value thereof . . .	5 0 0
Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of a grandfather or grandmother of the	

Legacies, &c.—*continued.*	Duty. £ s. d.
deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased, a duty at and after the rate of six pounds per centum on the amount or value thereof	*per cent.* 6 0 0
And where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, a duty at and after the rate of ten pounds per centum on the amount or value thereof . . .	10 0 0
And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this Schedule.	
And where any legatee shall take two or more distinct legacies or benefits under any will or testamentary instrument, which shall together be of the amount or value of £20, each shall be charged with duty, though each or either may be separately under that amount or value.	
Exemptions.(*s*)	
Legacies and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the Royal Family.	

(*s*) See §§ 300, 324 *supra* as to present exemptions.

And all legacies which were exempted from duty by the Act passed in the 39th year of his Majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty.

XXXIII.—5 & 6 *Vict. c.* 79.—[5*th August*, 1842.](*a*)

PROVIDES (§ 23) for a return of inventory duty in respect of debts if claimed within three years.

XXXIV.—8 & 9 *Vict. c.* 76.—[4*th August*, 1845.](*b*)

EXTENDS (§ 4) the terms of definition of a legacy.

XXXV.—13 & 14 *Vict. c.* 97.—[14*th August*, 1850.](*c*)

MAKES (§ 8) persons who have received money for legacy duty liable for the amount.

XXXVI.—*An ACT for granting to Her Majesty Duties on Succession to Property, and for altering certain Provisions of the Acts charging Duties on Legacies and Shares of Personal Estates*, 16 & 17 *Vict. c.* 51.—[4*th August*, 1853.]

THE following is the arrangement of this Act :—

Section 1. Interpretation of certain terms in this Act.
„ 2. What dispositions and devolutions of property confer successions; also what the terms "successor," "predecessor," mean.

(*a*) §§ 3, 21, and 22, and part of schedule of this Act repealed by 33 & 34 Vict. c. 99 (1870).

(*b*) § 1, from "from" to "thereof," and § 6 of this Act repealed by 38 & 39 Vict. c. 96 (1875), and §§ 2 and 3 repealed by 33 & 34 Vict. c. 99 (1870).

(*c*) The whole Act repealed by 33 & 34 Vict. c. 99 (1870), except § 8 as far as it relates to legacy duty.

Section 3. Joint tenants taking by survivorship to be deemed successors.
„ 4. General powers of appointment to confer successions.
„ 5. Extinction of determinable charges to confer successions.
„ 6. Persons now beneficially entitled to real property subject to leases for life not liable to duty.
„ 7. Dispositions accompanied by the reservation of a benefit to the grantor, &c., to confer successions.
„ 8. Dispositions to take effect at periods depending on death, or made for evading duty, to confer successions.
„ 9. Duties to be under the care and management of the Commissioners of Inland Revenue.
„ 10. Duties on successions.—See § 41 of 44 Vict. c. 12.
„ 11. Provision as to married persons chargeable with succession or legacy duty.
„ 12. What duties payable when the successor is also the predecessor.
„ 13. Provision as to joint predecessors.
„ 14. Duty on transmitted successions.
„ 15. Duties payable in respect of transferred interest.
„ 16. Succession subject to trusts for charitable or public purposes chargeable with duty.
„ 17. Provision for life policies and certain post-obit bonds.
„ 18. Exemptions.
„ 19. Leasehold estates not to be charged with legacy duty as personal estate.
„ 20. Duties to be paid on the successor becoming entitled in possession; but in the case of outstanding interests, at the determination thereof.
„ 21. The interest of a successor in real property to be considered as an annuity.
„ 22. Rule for valuing lands, houses, &c.
„ 23. Rule as to timber.
„ 24. Rule as to advowsons.
„ 25. Rule as to property subject to beneficial leases.
„ 26. Rule as to manors, mines, &c.
„ 27. Duty payable by corporations, &c., on taking real estates.
„ 28. Allowance for fines, &c., paid by successor.
„ 29. Real property directed to be sold, to be charged as personality.
„ 30. Personal property to be invested in real property, how to be charged.
„ 31. Annuities under this Act and the Legacy Duty Acts to be

valued according to the tables annexed to this Act.
Sec. 32. Provisions as to the assessment of personalty.
„ 33. Allowance to donee of general power of appointment.
„ 34. What allowance to be made for incumbrances.
„ 35. No allowance to be made in respect of contingent incumbrances, unless they take effect.
„ 36. The duty on successions to be calculated without regard to contingencies.
„ 37. Provision for allowance or return of duty.
„ 38. Allowance to be made to successor in respect of relinquished property.
„ 39. Power for Commissioners to compound duties.
„ 40. Power of Commissioners to receive duty in advance.
„ 41. Power for Commissioners to commute future duties. See § 11 of 43 Vict. c. 14.
„ 42. Duty to be a first charge on property.
„ 43. Provision for the separate assessments of properties.
„ 44. What persons accountable for duty.
„ 45. Notice of succession to be given to the Commissioners, and a return of the property made.
„ 46. Penalty on not giving notices of succession.
„ 47. Proceeding if return not made.
„ 48. Power to enforce returns from executors and administrators.
„ 49. Accounting party to verify his account by production of books and documents; and Commissioners may, without fee, inspect and take copies of public books.
„ 50. Power for accountable party to appeal.
„ 51. Duty to be entered by the Commissioners in a book, and a stamped receipt to be given.
„ 52. Protection to *bonâ fide* purchasers.
„ 53. Court in suits for the administration of property to provide for payment of duty.
„ 54. Commencement of Act.
„ 55. Short title.

Most Gracious Sovereign,

We, your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled, towards raising the necessary supplies for defraying your Majesty's public expenses, and making a permanent addition to the public revenue, have freely and voluntarily resolved to grant unto

your Majesty the duties hereinafter mentioned; and do most humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. In the construction and for the purposes of this Act—

The term "real property" shall include all freehold, copyhold, customary, leasehold, and other hereditaments, and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, except money secured on heritable property in Scotland(*a*), and all estates in any such hereditaments:

The term "personal property"(*b*) shall not include leaseholds, but shall include money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property:

The term "property" alone shall include real property and personal property:

The term "succession" shall denote any property chargeable with duty under this Act:

The term "trustee" shall include an executor and administrator, and any person having or taking on himself the administration of property affected by any express or implied trust:

The term "person" shall include a body corporate, company, and society:

The term "Legacy Duty Acts" shall denote the Acts now in force for charging duties on legacies and shares of the personal estates of deceased persons.

II. Every past or future disposition of property, by reason whereof any person has, or shall, become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or

(*a*) By § 117 of 31 & 32 Vict. c. 101, all heritable securities are made moveable estate, as from 31st Dec. 1868, even though the bonds have been granted previous to that date, so as to devolve to executors, except where expressly conceived in favour of heirs excluding executors.

(*b*) See § 83 *supra*. Property chargeable with duty under the Legacy Duty Acts is, by the proviso at the end of § 18 of this Act, exempted from duty under this Act.

expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession"; and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.(*c*)

III. Where any person shall, at or after the time appointed for the commencement of this Act, have any property vested in them jointly, by any title not conferring on them a succession, any beneficial interest in such property accruing to any of them by survivorship shall be deemed to be a succession; and every person to whom any such interest shall accrue shall be deemed to be the successor; and the person upon whose death such accruer shall take place shall be deemed to be the predecessor; and where any persons after the time appointed for the commencement of this Act shall take any succession jointly, they shall pay the duty, if any, chargeable thereon by this Act in proportion to their respective interests in the succession; and any beneficial interest in such succession accruing to any of them by survivorship shall be deemed to be a new succession, derived from the predecessor from whom the joint title shall have been derived.

IV. Where any person shall have a general power of appointment under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect, upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor.

V. Where any property shall at or after the time appointed for the commencement of this Act be subject to any charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate, or interest shall be deemed to be a succession accruing to the person, or the persons, if more than one, then

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(*c*) This section is not retrospective as to successions by devolution, but it is so as to successions by disposition.—See § 315 *supra*. The date of the Act (§ 54) is 19th May, 1853.

entitled beneficially to the property or the income thereof, according to his or their respective estates or interests therein, or beneficial enjoyment thereof; and the person or persons from whom such successor or successors respectively shall have derived title to the property so charged shall be deemed to be the predecessor or predecessors, as the case may be.(*d*)

VI. Provided that no person entitled, at the time appointed for the commencement of this Act, to the immediate reversion in any real property expectant upon the determination of any lease for life or for years determinable on life, shall be chargeable with duty in respect of such determination, in the event of the same occurring in his lifetime.

VII. Where any disposition of property, not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor, or any other person, for any term of life, or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for, on the person in whose favour such disposition shall be made.(*e*)

VIII. Where any disposition of property shall be made to take effect at a period ascertainable only by reference to the date of the death of any person dying after the time appointed for the commencement of this Act, such disposition shall be deemed to confer a succession on the person in whose favour the same shall be made; and where any disposition of property shall purport to take effect presently, or under such circumstances as not to confer a succession, but by the effect or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a court of law or equity, the beneficial ownership of such property shall not *bonâ fide* pass according to such disposition, but shall in fact devolve to any person on death, or at some period ascertainable only by reference to death, then such last-mentioned person shall be deemed to acquire the property so passing as a succession derived from the person making the disposition as the predecessor; and where any court of competent jurisdiction shall declare any disposition to have been fraudulent and made for the purpose of evading the duty imposed by this Act,

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(*d*) See § 20 of this Act as to a successor subject to a charge not created by himself.

(*e*) The object of this section is to prevent an evasion of property not coming within the definition of § 2 of the Act.—See § 38 of 44 Vict. c. 12.

it shall be lawful for such court to declare a succession to have been conferred on such person at such time and to such an extent as such court shall think just; and such last-mentioned person shall be deemed to have taken a succession accordingly derived from the person making such disposition as predecessor.

IX. The duties hereinafter imposed shall be considered as stamp duties, and shall be under the care and management of the Commissioners of Inland Revenue, hereinafter called "the Commissioners"(*f*); who, by themselves and their officers, shall have the same powers and authorities for the collection, recovery, and management thereof, as are by an Act passed in the session holden in the twelfth and thirteenth years of the reign of her present Majesty, chapter one, or by any other Act or Acts, vested in them for the collection, recovery, and management of any stamp duties; and shall provide proper stamps denoting the rate per centum of the duties payable under this Act; and shall have all other powers and authorities requisite for carrying this Act into execution.

X. There shall be levied and paid to Her Majesty, in respect of every such succession as aforesaid, according to the value thereof(*g*), the following duties (that is to say)—

Where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of one pound per centum upon such value(*h*):

Where the successor shall be a brother or sister, or a descendant of a brother or sister of the predecessor, a duty at the rate of three pounds per centum upon such value:

Where the successor shall be a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the predecessor, a duty at the rate of five pounds per centum upon such value:

Where the successor shall be a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the predecessor, a duty at the rate of six pounds per centum upon such value:

Where the successor shall be in any other degree of collateral consanguinity to the predecessor than is hereinbefore described,

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(*f*) The twenty-seventh section of 44 Vict. c. 12 places inventory and legacy duties and duties on accounts also under the management of the Commissioners of Inland Revenue.

(*g*) The twenty-first and following sections of the Act direct how the value is to be ascertained.—See § 317 *supra*.

(*h*) This duty not now payable where a duty has been paid on inventory or account. —44 Vict. c. 12, § 41.

or shall be a stranger in blood to him, a duty at the rate of ten pounds per centum upon such value.

XI. Where any person chargeable with duty under this Act in respect of any succession, or chargeable with duty under the Legacy Duty Acts in respect of any legacy bequeathed to him or her by a testator dying after the time appointed for the commencement of this Act, or in respect of the personal estate of any person dying after the same period, shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor, testator, or deceased person, then the person taking such succession, legacy, or personal estate, shall pay in respect thereof the same rate of duty only as such his or her wife or husband would have been chargeable with if she or he had taken the same.(*i*)

XII. Where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made ; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself, and no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he shall have been entitled to the property subjected thereto expectantly on the death of some person dying after the time appointed for the commencement of this Act.

XIII. Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the Commissioners to agree with the successor as to the duty payable ; but if no such agreement shall be made, the successor shall be deemed to have derived his succession in equal proportions from each predecessor, and shall be chargeable with duty accordingly.

XIV. Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in

(*i*) This section only applies where the successor or legatee has married a relation of the predecessor or testator, and not where the latter has married a relation of the successor or legatee.—Hanson, page 268.

possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them.(*k*)

XV. Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation or other derivative title(*l*), in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto, or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place.

XVI. Where property shall become subject to a trust for any charitable or public purposes, under any past or future disposition, which, if made in favour of an individual, would confer on him a succession, there shall be payable in respect of such property, upon its becoming subject to such trusts, a duty at the rate of ten pounds per centum upon the amount or principal value(*m*) of such property; and it shall be lawful for the trustee of any such property to raise the amount of any duty due in respect thereof, with all reasonable expenses, upon the security of the charity property, at interest, with power for him to give effectual discharges for the money so raised.

XVII. No policy of insurance on the life of any person shall create

(*k*) This section does not in any way interfere with the operation of the Legacy Duty Acts, according to which (36 Geo. III. c. 52, § 6) the duty is payable under the *will* or *intestacy* of the deceased person.

(*l*) The object here is to extend the retrospective operation of the Act to derivative as well as to original owners, and to carry out the principle (which obtains equally with regard to legacies) of making the time of payment, and not the time of vesting, the criterion of the liability to duty.—Hanson, page 278.

(*m*) Heritable property is in general chargeable according to the annual value (§ 21 of this Act), the only exceptions being those introduced by this section, and § 27. See § 322.

the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured, and no bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth(*n*), for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract, and the person to or with whom the same shall be made; but any disposition or devolution of the monies payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession.

XVIII. Where the whole succession or successions derived from the same predecessor, and passing upon any death to any person or persons, shall not amount in money or principal value to the sum of one hundred pounds, no duty shall be payable under this Act in respect thereof or of any portion thereof; and no duty shall be payable under this Act upon any succession which, as estimated according to the provisions of this Act, shall be of less value than twenty pounds in the whole, or upon any monies applied to the payment of the duty on any succession according to any trust for that purpose, or by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts; and no person shall be charged with duty under this Act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this Act; and no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also(*o*) with the duty granted by this Act in respect of the same acquisition of the same property.

XIX. No legatee or other person shall, after the time appointed for the commencement of this Act, be chargeable under the Legacy Duty Acts with duty, not then already due, in respect of any leasehold hereditaments of any testator or deceased person, as belonging to the personal estate of the testator or deceased.(*p*)

XX. The duty imposed by this Act shall be paid at the time when

(*n*) The words, "money or money's worth," "appear to have been selected for the purpose of excluding the consideration of marriage."—Hanson, p. 290. See *Crown* v. *Earl of Fife*, 5th December, 1883.

(*o*) The exemption here does not protect legatees from being chargeable with duty under this Act by reason merely of their not being liable to duty under the Legacy Duty Acts.—Hanson, p. 295. The cases of express exemption from payment of legacy duty are stated in 55 Geo. III. c. 184, schedule, part iii. *supra*. See also § 324 *supra*.

(*p*) The object here is to give a retrospective operation to that part of the Act which makes leasehold estates chargeable with duty upon the same footing as real property.

the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that if there shall be any prior charge, estate, or interest, not created by the successor himself, upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate, or interest shall, if not previously paid, compounded for, or commuted(*q*), be paid at the time of such determination; and except that in case of an annuity, or property hereby made chargeable as an annuity, the duties shall be paid by such instalments as are hereinafter directed or referred to; provided that no duty shall be payable upon the determination of any lease purporting at the date thereof to be a lease at rack-rent, in respect of the increase accruing to the successor upon such determination.

XXI. The interest of every successor, except as herein provided(*r*), in real property(*s*), shall be considered to be of the value of an annuity(*t*) equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession(*u*), or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity, for the purposes of this Act, shall be valued according to the tables in the schedule annexed to this Act; and the duty chargeable thereon shall be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the seven following instalments at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become due, provided that if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be

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(*q*) See §§ 39 and 41 of this Act; also § 11 of 43 Vict. c. 14, which authorises the Commissioners to commute *future* claims after all present claims have been satisfied; but by § 43 of 44 Vict. c. 12, they are authorised to compound all claims, either present or future, under a *will* for a single immediate payment.—See also § 328 *supra*.

(*r*) The exceptions here referred to are those in §§ 16, 23, 24, 26, and 27 of this Act.

(*s*) The duty on *personal* property is to be assessed and paid in the manner of legacies.—§ 32 of this Act.

(*t*) The duty is thus a tax on capital and not on income.

(*u*) The duty falls to be calculated according to the successor's age at the time when his title accrued, and the value apparently of the property as it existed at the time fixed by § 45 of this Act for the delivery of the account. See as to methods of calculating value of annuities, &c., *supra*, pp. 414-417; also p. 481 *infra*.

payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest, in exoneration of his other property, and shall be payable by the owner for the time being of such interest.

XXII. In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance shall be made of all necessary outgoings.

XXIII. Where timber, trees, or wood, not being coppice or underwood, shall be comprised in any succession, the successor shall be chargeable with duty upon his interest in the net monies, after deducting all necessary outgoings for the year, which shall from time to time be received from any sales of such timber, trees, or wood, and shall account for and pay the same yearly; provided that no duty shall be payable on the net monies received from the sale of timber, trees or wood in any one year unless such net monies shall exceed the sum of ten pounds; provided, that if the successor shall be desirous of commuting the duty, and shall deliver to the Commissioners an estimate of the net monies obtainable by him from the sale of such timber, trees, and wood as may, in a prudent course of management of the property, be felled by such successor during his life, the Commissioners, if satisfied with such estimate, shall accept the same and assess the duty accordingly.(*v*)

XXIV. A successor shall not be chargeable with duty in respect of any advowson or church patronage comprised in his succession, unless, the same, or some right of presentation, or some other interest in or out of such advowson or church patronage, shall be disposed of by or in concert with him for money or money's worth, in which case he shall be chargeable with duty upon the amount or value of the money or money's worth for which the same, or any such presentation or interest, shall be so disposed of at the time of such disposal.(*w*)

XXV. Where a successor, entitled to any real property, subject to any lease by reason whereof he shall not be presently entitled to the full enjoyment thereof, shall not have paid duty in respect of the full yearly value of such property, he shall be chargeable with duty upon his interest in any fine or grassum or other consideration which

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(*v*) See § 317 *supra*. See also 17 & 18 Vict. c. 91, § 6, as to the valuation of woods in Scotland.

(*w*) See § 317 *supra*.

may be received during his life for the renewal of any such lease, or the grant of any reversionary lease of the same property.(*x*)

XXVI. The yearly value of any manor, opened mine, or other real property of a fluctuating yearly income, shall either be calculated upon the average profits or income derived therefrom, after deducting all necessary outgoings(*y*) during such a number of preceding years as shall be agreed upon for this purpose between the Commissioners and the successor, before the first payment of duty on the succession shall have become due; or if no such period shall be agreed upon(*z*), then the principal value of such property shall be ascertained, and the annual value thereof shall be considered to be equal to interest calculated at the rate of three pounds per centum per annum on the amount of such principal value.

XXVII. Where any body corporate, company, or society shall become entitled, as successors, to any real property, the duty in respect thereof shall be assessed upon the principal value(*a*) of such property, but shall be payable by such instalments, at such times, and in such manner as the same would be payable if assessed in respect of property devolving on a successor in fee-simple; and it shall be lawful for such body corporate, company, or society, or any trustee thereof, to raise the amount of any duty due in respect of their succession upon the security thereof, at interest, with power for them to give effectual discharges for the money so raised.

XXVIII. If a successor, or any person on his behalf, upon becoming entitled to any copyhold or other real property, shall be subject to any fines, casualties of superiority, compositions, reliefs, or charges incident to the tenure thereof, and due in respect of his succession, he shall be entitled to have a deduction allowed to him of the amount of such fines, casualties, compositions, reliefs, or charges from the assessable value of his interest in such copyhold or other real property.

XXIX. The interest of any successor in monies to arise from the sale of real property under any trust for the sale thereof, so far as the same shall not be chargeable with duty under the Legacy Duty Acts(*b*), shall be deemed to be personal property chargeable with

(*x*) This section is supplemental to § 20 of the Act; it applies only to property for which duty has already been paid by the successor.

(*y*) See § 318, *supra*.

(*z*) Either side may apparently require the other to take the course here indicated.

(*a*) The interest of a corporation could not be assessed under § 21 of this Act, hence the necessity of this provision. A somewhat similar provision is made in § 16, with reference to property given to charitable or public purposes.

(*b*) This section supplements the provisions of the Legacy Duty Acts by making heritable property sold under a trust, chargeable with duty whether re-invested or not. The proceeds of such property were not chargeable with duty under these Acts if the object was not its distribution but its re-investment.

duty under this Act; provided that where such monies shall be subject to any trust for the re-investment thereof in the purchase of other real property, to which the successor would not be absolutely entitled, such monies shall be deemed to be real property, and for the purpose of this Act each successor's interest therein shall be considered to be of the value of an annuity, payable during his life or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall then be the real property subject to the trust or direction for sale, or any property purchased in substitution for it, or any intermediate investment of the produce of the sale of the original property.

XXX. The interest of any successor in personal property subject to any trust for the investment thereof in the purchase of real property to which the successor would be absolutely entitled shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts(*c*), be chargeable with duty under this Act as personal property; and personal property subject to any trust for the investment thereof in the purchase of real property to which the successor would not be absolutely entitled shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts, be chargeable with duty under this Act as real property; and for the purposes of this Act each successor's interest therein shall be considered to be of the value of an annuity, payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall be the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase.

XXXI. Where it shall be required to calculate, for the purposes either of this Act or of the Legacy Duty Acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement of this Act, be calculated according to the tables in the schedule annexed to this Act, and not according to the tables in the schedule annexed to the Act of the thirty-sixth year of the reign of King George the Third, chapter fifty-two(*d*), and such annuity or interest shall be chargeable with duty accordingly.

XXXII. The following provisions relating to the assessment and payment of duty on personal estate, and the exemption thereof from duty in certain cases, namely, the eighth, tenth, eleventh, twelfth,

(*c*) 36 Geo. III. c. 52, § 19, *supra*; 45 Geo. III. c. 28, § 7, *supra*.
(*d*) § 8 of that Act. See illustrations, §§ 414-417, *supra*.

fourteenth, and twenty-third sections of the said Act of the thirty-sixth year of the reign of King George the Third, chapter fifty-two, shall be applicable to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such personal property were a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions, and as if the tables in the said Act referred to were the tables in the schedules annexed to this Act.(*e*)

XXXIII. Where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property.(*f*)

XXXIV. In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any monies which the successor may previously to his possession have laid out in the substantial repairs or permanent improvement of real property comprised in his succession; provided that upon any successor becoming entitled to real property subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value *pro tanto* of such real property.

XXXV. In estimating the value of a succession no allowance shall be made in respect of any contingent incumbrance thereon; but in the event of such incumbrance taking effect as an actual burden on the interest of the successor, he shall be entitled to a return of a proportionate amount of the duty so paid by him in respect of the amount or value of the incumbrance when taking effect.

XXXVI. In estimating the value of a succession, no allowance shall be made in respect of any contingency upon the happening of which the property may pass to some other person; but in the event of the same so passing the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interest.(*g*)

XXXVII. Where a successor shall not have obtained the whole

(*e*) See § 291 *supra*.

(*f*) See § 4 of this Act.

(*g*) See §§ 8 and 17 of 36 Geo. III. c. 52, *supra*.

of his succession at the time of the duty becoming payable, he shall be chargeable only with duty on the value of the property or benefit from time to time obtained by him ; and whenever any duty shall have been paid on account of any succession, and it shall afterwards be proved to the satisfaction of the Commissioners that such duty, not being due from the person paying the same, was paid by mistake, or was paid in respect of property which the successor shall have been unable to recover, or from or of which he shall have been evicted or deprived by any superior title, or that for any other reason it ought to be refunded, the Commissioners shall thereupon refund the same to the person entitled thereto.(*h*)

XXXVIII. Where any successor, upon taking a succession, shall be bound to relinquish or be deprived of any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property.

XXXIX. Where, in the opinion of the Commissioners, any succession shall be of such a nature, or so disposed or circumstanced, that the value thereof shall not be fairly ascertainable under any of the preceding directions, or where, from the complication of circumstances affecting the value of a succession, or affecting the assessment or recovery of the duty thereon, the Commissioners shall think it expedient to exercise this present authority, it shall be lawful for them to compound the duty payable on the succession upon such terms as they shall think fit, and to give discharges to the successor, upon payment of duty according to such composition ; and it shall be lawful for them, in any special cases in which they may think it expedient so to do, to enlarge the time for payment of any duty.(*i*)

XL. It shall be lawful for the Commissioners to receive any duty tendered to them in advance, and to allow discount thereon at the rate of four pounds per centum per annum, or at such other rate as may from time to time be directed by the Commissioners of her Majesty's Treasury ; and no person, by reason of his having made any payment of duty in advance, shall be prejudiced in his right to have any repayment of duty made to him to which he may become entitled under any of the provisions of this Act.(*k*)

(*h*) Provisions for refunding legacy duty are made by § 34 of 36 Geo. III. c. 52, *supra*.

(*i*) The 36 Geo. III. c. 52, § 32, enables the Commissioners to compound legacy duty with the sanction of the Court; but by § 43 of 44 Vict. c. 12, they may, without such sanction, compound for a single immediate payment all claims for legacy duty under a will.

(*k*) Although the terms of this section do not expressly apply to legacy duty, the provision is applied to it in practice.

XLI. It shall be lawful for the Commissioners, in their discretion, upon application made by any person who shall be entitled to a succession in expectancy, to commute the duty presumptively payable in respect of such succession for a certain sum to be presently paid, and for assessing the amount which shall be so payable they shall cause a present value to be set upon such presumptive duty, regard being had to the contingencies affecting the liability to such duty, and the interest of money involved in such calculation being reckoned at the rate for the time being allowed by the Commissioners in respect of duties paid in advance; and upon the receipt of such certain sum they shall give discharges to the successor accordingly.(*l*)

XLII. The duty imposed by this Act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed; and such duty shall also be a first charge on the interest of the successor in the personal property in respect whereof the same shall be assessed, while the same shall remain in the ownership or control of the successor, or of any trustee for him, or of his guardian or committee, or tutor or curator, or of the husband of any wife who shall be the successor; and the said duty shall be a debt due to the Crown from the successor, having, in the case of real property comprised in any succession, priority over all charges and interests created by him, but such duty shall not charge or affect any other real property of the successor than the property comprised in such succession; provided, that where any settled real property comprised in a succession shall be subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorising by his consent the exercise of such power, or exercising any power with proper consent, as the case may be; and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime upon his interest also in all monies arising from the exercise of any such power, and in all investments of such monies.(*m*)

XLIII. The Commissioners shall, at the request of any successor, or any person claiming in his right, accept or cause to be made so many separate assessments of the duty payable in respect of the

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(*l*) This section supplemented by § 11 of 43 Vict c. 14, and § 43 of 44 Vict. c. 12, *infra*.

(*m*) See § 44 of this Act as to persons accountable for the duty.

interest of the successor in any separate properties, or in defined portions of the same property, as shall be reasonably required; and in such cases the respective properties shall be chargeable only with the amount of duty separately assessed in respect thereof; and it shall be lawful also for the Commissioners, by their certificates, to be issued in such form as they shall think fit, from time to time to declare that any duties already assessed, whether collectively or distributively, in respect of any succession, shall thenceforth be charged, as to any unpaid instalments, according to any further distribution thereof, upon separate parts only of the property in respect of which such assessment shall have been made, in which case the charge of such duties shall be thenceforth limited according to such further distribution.

XLIV. The following persons, besides the successor, shall be personally accountable to her Majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively after the time appointed for the commencement of this Act; that is to say, every trustee, guardian, committee, tutor, or curator, or husband in whom respectively any property, or the management of any property, subject to such duty, shall be vested, and every person in whom the same shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession; and all such trustees, guardians, committees, tutors, curators, husbands, and persons shall be authorised to compound, or pay in advance, or commute any duty, and retain out of the property subject to any such duty the amount thereof, or to raise such amount, and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the successor; and in the event of the non-payment of such duty as aforesaid, every person hereby made accountable shall be a debtor to her Majesty in the amount of the unpaid duty for which he shall be so accountable.

XLV. The persons hereby made accountable for the payment of duty in respect of any succession, or some of them, shall, in the case of personal property, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of the same or any part thereof to or for the successor, or any person in his right, and in the case of real property, when any duty in respect thereof shall first become payable, give notice to the Commissioners or to their officers of their liability to such duty, and shall at the same time deliver to the Commissioners or to their officers a full and true account of the

property for the duty whereon they shall respectively be accountable, and of the value thereof, and of the deductions claimed by them, together with the names of the successor and predecessor, and their relation to each other, and all such other particulars as shall be necessary or proper for enabling the Commissioners fully and correctly to ascertain the duties due ; and the Commissioners, if satisfied with such account and estimate as originally delivered, or with any amendments that may be made therein upon their requisition, may assess the succession duty on the footing of such account and estimate ; but it shall be lawful for the Commissioners, if dissatisfied with such account and estimate, to cause an account and estimate to be taken by any person or persons to be appointed by themselves for that purpose, and to assess the duty on the footing of such last-mentioned account and estimate, subject to appeal, as hereinafter provided(*n*) ; and if the duty so assessed shall exceed the duty assessable according to the return made to the Commissioners, and with which they shall have been dissatisfied, and if there shall be no appeal against such assessment, then it shall be in the discretion of the Commissioners, having regard to the merits of each case, to charge the whole or any part of the expenses incident to the taking of such last-mentioned account and estimate on the interest of the successor in respect whereof the duty shall be due, in increase of such duty, and to recover the same forthwith accordingly ; and if there shall be an appeal against such last-mentioned assessment, then the payment of such expenses shall be in the discretion of the court of appeal hereinafter appointed.

XLVI. If any person required to give any such notice, or deliver such account as aforesaid, shall wilfully neglect to do so at the prescribed period, he shall be liable to pay to her Majesty a sum equal to ten pounds per centum upon the amount of duty payable by him, or in the case of a succession chargeable with a higher rate of duty than one pound per centum upon the value thereof, upon such less sum as such duty, if assessable at the rate of one pound per centum upon the value of the succession, would amount to, and a like penalty for every month after the first month during which such neglect shall continue ; and if any person liable under this Act to pay any duty shall, after such duty shall have been finally ascertained, wilfully neglect to do so within twenty-one days, he shall also be liable to pay to her Majesty a sum equal to ten pounds per centum upon the amount of duty so unpaid, or upon such less sum as such duty, if assessable at the rate of one pound per centum on the value of the succession, would amount to, and a like penalty

(*n*) See § 50 of this Act.

for every month after the first month during which such neglect shall continue.(*o*)

XLVII. If any accountable party required by the Commissioners to deliver any such account as aforesaid shall make default in doing so, it shall be lawful for the Commissioners to sue, out of her Majesty's Court of Exchequer in England, Scotland, or Ireland, as they shall think expedient, according to the circumstances of the case, and for such court to issue, a writ of summons in such form as the judges of such court shall from time to time frame, commanding the party so in default to deliver such account within such period as may be appointed in the writ, or to show cause to the contrary; and on cause being shown, such order shall be made as shall be just.(*p*)

XLVIII. The Commissioners shall, for the purposes of the Legacy Duty Acts, be empowered to require and enforce the delivery of accounts from executors, administrators, and trustees of property and legatees chargeable with duty under such Acts, and for the duty whereon they shall be accountable, in the same manner as they are by the last preceding section of this Act empowered to require and enforce the delivery of accounts for the purposes of this Act.

XLIX. Every person who, under the provisions of this Act, may deliver any account or estimate of the property comprised in any succession shall, if required by the Commissioners, produce before them such books and documents in the custody or control of such person, so far as the same relate to such account or estimate, as may be capable of affording any necessary information for the purpose of ascertaining such property and the duty payable thereon; and the Commissioners may, without payment of any fee, inspect and take copies of any public book; but all such information shall be deemed to be confidential, and the Commissioners shall not disclose the same, or the contents of any document or book, to any person, otherwise than for the purposes of this Act.

L. It shall be lawful for any accountable party dissatisfied with the assessment of the Commissioners, upon giving, within twenty-one days after the date of such assessment, notice in writing to the Commissioners of his intention to appeal against such assessment, and a statement of the grounds of such appeal, such statement to be furnished within the further period of thirty days, to appeal by petition accordingly to her Majesty's Court of Exchequer in England,

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(*o*) In practice interest is taken on the unpaid duty in virtue of 31 & 32 Vict. c. 124, § 9 *supra*.

(*p*) The practice in Scotland in revenue cases is regulated by 19 & 20 Vict. c. 56, which constitutes the Court of Session the Court of Exchequer there.

Scotland, or Ireland, according to the place in which the appellant shall be resident, and every such court, or any judge thereof sitting in chambers, shall have jurisdiction to hear and determine the matter of such appeal and the costs thereof, with power to direct, for the purposes of such appeal, any inquiry, valuation, or report to be made by any officer of the court, or other person, as such Court or judge may think fit: Provided, that where the sum in dispute in respect of duty on such assessment does not exceed fifty pounds, the accountable party may, having given notice of appeal and delivered a statement of the grounds thereof as hereinbefore directed, appeal to the judge of the County Court in England, the Sheriff-Court in Scotland, or the Assistant-Barrister's Court in Ireland, for the district, county, or division in which the appellant shall be resident, or the property be situate; and every such judge shall have jurisdiction to hear and determine the matter of such last-mentioned appeal, with the like power and authority as are by this section given to a judge of her Majesty's Court of Exchequer.(*q*)

LI. Whenever any payment of duty shall be made under this Act, the same shall be entered in a book to be kept by the Commissioners for this purpose, and the Receiver-General of Inland Revenue, or other proper officer appointed by the Commissioners, shall give a receipt for the same in such form as they shall think fit, and stamped with the proper stamp for denoting the rate of duty, and the Commisioners shall from time to time deliver to any person interested in any property affected by such duty, on applying for the same for any reasonable purpose approved by the Commissioners, a certificate, in such form as they may think fit, of such payment.

LII. Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession or any part thereof, shall exonerate a *bonâ fide* purchaser for valuable consideration, and without notice, from such duty, notwithstanding any suppression or misstatement in the account upon the footing whereof the same may have been assessed, or any insufficiency of such assessment; and no *bonâ fide* purchaser of property for valuable consideration under a title not appearing to confer a succession shall be subject to any duty with which such property may be chargeable under the provisions of this Act, by reason of any extrinsic circumstances of which he shall not have had notice at the time of such purchase.

LIII. Whenever any suit shall be pending in any Court for the administration of any property chargeable with duty under this Act

(*q*) See § 45 of this Act.

or the Legacy Duty Acts, such court shall provide, out of any property which may be in the possession or control of the court, for the payment of duty to the Commissioners.(*r*)

LIV. This Act shall be taken to have come into operation on the nineteenth day of May, one thousand eight hundred and fifty-three, and shall take effect accordingly.

LV. This Act may be cited for all purposes as "The Succession Duty Act, 1853."

The SCHEDULE to which this Act refers :—

TABLE I.

THE VALUES OF AN ANNUITY OF £100 PER ANNUM HELD ON A SINGLE LIFE.

Years of Age.	Values.	Years of Age.	Values.	Years of Age.	Values.	Years of Age.	Values.
	£ s. d.		£ s. d.		£ s. d.		£ s. d.
Birth	1892 8 6	25 ...	1694 0 0	50 ...	1242 19 6	75 ...	541 0 6
1 ...	1906 13 0	26 ...	1686 14 6	51 ...	1213 17 0	76 ...	511 9 6
2 ...	1919 2 0	27 ...	1677 5 6	52 ...	1185 14 0	77 ...	477 17 0
3 ...	1926 8 0	28 ...	1667 1 0	53 ...	1157 17 6	78 ...	444 9 6
4 ...	1928 16 0	29 ...	1656 1 0	54 ...	1130 13 0	79 ...	412 9 6
5 ...	1926 19 6	30 ...	1644 7 6	55 ...	1103 18 0	80 ...	381 3 0
6 ...	1921 12 0	31 ...	1632 0 0	56 ...	1077 10 0	81 ...	350 14 6
7 ...	1913 4 6	32 ...	1619 0 6	57 ...	1051 10 0	82 ...	321 14 6
8 ...	1902 16 6	33 ...	1605 4 0	58 ...	1025 10 0	83 ...	292 10 0
9 ...	1890 19 6	34 ...	1590 9 6	59 ...	999 1 0	84 ...	263 2 0
10 ...	1878 3 0	35 ...	1574 17 6	60 ...	972 1 0	85 ...	234 18 6
11 ...	1864 7 0	36 ...	1558 9 6	61 ...	943 15 6	86 ...	207 16 0
12 ...	1849 12 0	37 ...	1541 10 6	62 ...	914 2 0	87 ...	184 11 6
13 ...	1833 18 6	38 ...	1524 0 0	63 ...	883 6 0	88 ...	164 17 6
14 ...	1817 7 6	39 ...	1506 1 6	64 ...	852 9 0	89 ...	148 7 0
15 ...	1800 8 6	40 ...	1487 10 0	65 ...	821 12 6	90 ...	133 9 0
16 ...	1783 13 0	41 ...	1468 4 0	66 ...	790 15 0	91 ...	122 16 0
17 ...	1767 16 0	42 ...	1447 11 6	67 ...	761 19 0	92 ...	107 7 0
18 ...	1753 5 6	43 ...	1426 2 0	68 ...	733 8 6	93 ...	93 3 0
19 ...	1740 11 0	44 ...	1403 10 0	69 ...	705 4 0	94 ...	79 8 6
20 ...	1729 9 6	45 ...	1379 14 6	70 ...	677 9 0	95 ...	64 11 0
21 ...	1719 17 0	46 ...	1354 16 6	71 ...	650 8 0		
22 ...	1713 1 0	47 ...	1328 2 6	72 ...	623 19 6		
23 ...	1706 16 6	48 ...	1300 9 6	73 ...	597 7 6		
24 ...	1700 11 6	49 ...	1271 19 6	74 ...	569 13 0		

TABLE II.

THE VALUES OF AN ANNUITY OF £100 PER ANNUM, HELD ON THE JOINT CONTINUANCE OF TWO LIVES.

This Table, from its inordinate length, is unsuitable for this work. Moreover it is now practically superseded by the epitome of the Government Tables given in Table IV. below, p. 481.

(*r*) This section supplements § 25 of 36 Geo. III. c. 52, *supra*.

TABLE III.

THE VALUE OF AN ANNUITY OF £100 PER ANNUM, FOR ANY NUMBER OF YEARS NOT EXCEEDING 95.

Years.	Value.	Years.	Value.	Years.	Value.	Years.	Value.
	£ s. d.		£ s. d.		£ s. d.		£ s. d.
1 ...	96 3 0	25 ...	1562 4 0	49 ...	2134 2 6	73 ...	2357 5 0
2 ...	188 12 0	26 ...	1598 5 6	50 ...	2148 4 0	74 ...	2362 15 0
3 ...	277 10 0	27 ...	1632 19 0	51 ...	2161 14 6	75 ...	2368 0 6
4 ...	362 19 6	28 ...	1666 6 0	52 ...	2174 15 0	76 ...	2373 2 0
5 ...	445 3 6	29 ...	1698 7 0	53 ...	2187 5 0	77 ...	2377 19 6
6 ...	524 4 0	30 ...	1729 4 0	54 ...	2199 5 6	78 ...	2382 13 6
7 ...	600 4 0	31 ...	1758 16 6	55 ...	2210 17 0	79 ...	2387 4 0
8 ...	673 5 0	32 ...	1787 7 0	56 ...	2221 19 6	80 ...	2391 10 6
9 ...	743 10 6	33 ...	1814 15 0	57 ...	2232 13 0	81 ...	2395 14 0
10 ...	811 1 6	34 ...	1841 2 0	58 ...	2242 19 0	82 ...	2399 14 0
11 ...	876 0 6	35 ...	1866 9 0	59 ...	2252 16 6	83 ...	2403 11 6
12 ...	938 10 0	36 ...	1890 16 6	60 ...	2262 6 6	84 ...	2407 5 6
13 ...	998 11 0	37 ...	1914 5 0	61 ...	2271 9 6	85 ...	2410 17 0
14 ...	1056 6 0	38 ...	1936 15 6	62 ...	2280 5 6	86 ...	2414 5 6
15 ...	1111 16 6	39 ...	1958 8 6	63 ...	2288 14 6	87 ...	2417 11 6
16 ...	1165 4 6	40 ...	1979 5 6	64 ...	2296 17 0	88 ...	2420 14 6
17 ...	1216 11 0	41 ...	1999 6 0	65 ...	2304 13 0	89 ...	2423 15 6
18 ...	1265 18 6	42 ...	2018 11 0	66 ...	2312 3 6	90 ...	2426 14 6
19 ...	1313 7 6	43 ...	2037 1 6	67 ...	2319 8 0	91 ...	2429 10 6
20 ...	1359 0 6	44 ...	2054 17 6	68 ...	2326 7 0	92 ...	2432 5 0
21 ...	1402 18 0	45 ...	2072 0 0	69 ...	2333 0 6	93 ...	2434 17 0
22 ...	1445 2 0	46 ...	2088 9 0	70 ...	2339 9 0	94 ...	2437 7 0
23 ...	1485 13 6	47 ...	2104 5 6	71 ...	2345 12 6	95 ...	2439 15 6
24 ...	1524 13 6	48 ...	2119 10 0	72 ...	2351 11 0		

RULES FOR INFERRING

The value of an annuity of £100 per annum, held on the longest of two lives.

Also, the value of an annuity of £100 per annum, held on the joint continuance of three lives.

Also, the value of an annuity of £100 per annum, held on the longest of three lives.

RULE for DETERMINING the VALUE of an ANNUITY of £100 per annum, held on the longest of two lives.

The values of an annuity of £100 per annum held on each of the single lives, to be added together (from Table I.), and from this sum the value of an annuity held on the joint continuance of the two lives (from Table II.) to be subtracted; the result is the value of an annuity of £100 per annum, held on the longest of the two lives.

RULE for DETERMINING the VALUE of an ANNUITY of £100 per annum, held on the joint continuance of three lives.

The value of an annuity of £100 per annum on the joint continuance of the two elder lives is to be found from Table II. The age of a single life

of the same (or nearest) value, with the annuity on the said joint lives, to be found from Table I. The value of an annuity of £100 per annum on the joint continuance of this life and the younger life from Table II., five pounds being deducted from this sum, the remainder is the value of an annuity of £100 per annum held on the joint continuance of the three lives.

RULE for DETERMINING the VALUE of an ANNUITY of £100 per annum, held on the longest of three lives.

The values of an annuity of £100 per annum for each of the three single lives to be extracted from Table I., and to be added together. The value of an annuity of £100 per annum on the joint continuance of the two youngest lives, also the value of an annuity of £100 per annum on the joint continuance of the two eldest lives, also the value of an annuity of £100 per annum on the joint continuance of the oldest life and the youngest life (all found by Table II.) to be subtracted from the sum or addition of the annuities on the three single lives. To the result is to be added the value of an annuity of £100 per annum held on the joint continuance of the three lives; the amount is the value of an annuity of £100 per annum on the longest of the three lives.

FURTHER RULE.

And in all cases where the annuity shall be for more than three lives, the same shall be valued as an annuity for the three youngest of such lives; and where the annuity shall be given for a longer term of years than ninety-five years, or in perpetuity, the same shall be valued as an annuity for ninety-five years only.

TABLE IV. (*s*)

This is an expansion of the first table, and an epitome of "New Government Tables" computed by the official calculator appointed to frame the various tables appertaining to the Succession Act.

The first table—which denotes the value of £100 only—is so limited as to be practically useless to many persons who have odd pounds, shillings, and pence to find the precise value of; while the new Government tables in their entirety—comprising ninety-six pages—are too long for this book. We, therefore, intend to give only five sets of figures, which by simple addition and multiplication will enable the most unskilful in numbers to ascertain the value of any annuity, whether the amount be in round sums or otherwise.

The ages and the value of an annuity of 1s., 2s. 6d., 5s., £1, and £10 will suffice for every exigency; but when it is necessary to calculate above £100, take that value from the first table and find the difference by this. Thus, suppose you wish to find the value of £587, 15s., at age 21, proceed as follows:—

(*s*) This and the following three Tables are taken from "Phippen's Practical Advice to Testators and Executors," 3rd ed., London, 1876.

£500 by Table No. 1 is worth									£8599	5	0
£87, 15s. by *this* table is worth									1509	2	6
Thus, 8 times £10	0	0	are worth			£1375	17	4			
„ 7 times	1	0	0	do.		120	7	5			
„ 3 times	0	5	0	do.		12	17	9			
As shown above						£1509	2	6			
									£10,108	7	6

Proof by New Government Tables :—

£500	0	0	is worth	£8599	5	0
80	0	0	do.	1375	17	7
7	0	0	do.	120	7	9
0	10	0	do.	8	11	11
0	5	0	do.	4	5	11
Deduct the above from this					£10,108	8	2
Difference					£0	0	8

Take the extreme rate of duty of ten per cent., and it will be found that a slight deviation of eightpence on the capital value does not amount to one penny duty; and hence the epitomised table is for ordinary purposes as effective as the one of ninety-six pages.

It is true the latter also indicates the duty payable on each sum at the several rates of 1, 3, 5, 6, and 10 per cent.; but after our reiterated design to employ as few figures as the nature of our illustrations will justify, it would be an insult to the intellect of our readers to work out these calculations for them, as we imagine any person acquainted with the rudiments of arithmetic can do so for himself.

The amount of the annual sum will be found in the first column, and the values according to ages in the horizontal line.

Amount of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.		
£	s.	d.		£	s.	d.		£	s.	d.		£	s.	d.		£	s.	d.		£	s.	d.
0	1	0		0	18	11	2	0	19	2	4	0	19	3	6	0	19	2	8	0	19	0
0	2	6		2	7	3		2	7	11		2	8	2		2	8	0		2	7	6
0	5	0	Birth.	4	14	7		4	15	11		4	16	5		4	16	0		4	15	1
1	0	0		18	18	5		19	3	9		19	5	9		19	4	3		19	0	6
10	0	0		189	4	10		191	18	2		192	17	7		192	3	2		190	5	7
0	1	0	1	0	19	0	3	0	19	3	5	0	19	3	7	0	19	1	9	0	18	10
0	2	6		2	7	7		2	8	1		2	8	2		2	7	9		2	7	3
0	5	0		4	15	3		4	16	3		4	16	4		4	15	7		4	14	6
1	0	0		19	1	3		19	5	3		19	5	4		19	2	7		18	18	2
10	0	0		190	13	3		192	12	9		192	13	11		191	6	5		189	1	11

Amount of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.		
£	s.	d.		£	s.	d.		£	s.	d.		£	s.	d.		£	s.	d.		£	s.	d.
0	1	0	10	0	18	9	19	0	17	4	28	0	16	8	37	0	15	4	46	0	13	6
0	2	6		2	6	11		2	3	6		2	1	8		1	18	6		1	13	10
0	5	0		4	13	10		4	7	0		4	3	4		3	17	0		3	7	8
1	0	0		18	15	7		17	8	1		16	13	4		15	8	3		13	10	11
10	0	0		187	16	3		174	1	1		166	14	1		154	3	0		135	9	7
0	1	0	11	0	18	7	20	0	17	3	29	0	16	6	38	0	15	2	47	0	13	3
0	2	6		2	6	7		2	3	2		2	1	4		1	18	1		1	13	2
0	5	0		4	13	2		4	6	5		4	2	9		3	16	2		3	6	4
1	0	0		18	12	10		17	5	10		16	11	2		15	4	9		13	5	7
10	0	0		186	8	8		172	18	11		165	12	1		152	8	0		132	16	3
0	1	0	12	0	18	5	21	0	17	2	30	0	16	5	39	0	15	0	48	0	13	0
0	2	6		2	6	2		2	2	11		2	1	1		1	17	7		1	12	6
0	5	0		4	12	5		4	5	11		4	2	2		3	15	3		3	5	0
1	0	0		18	9	11		17	3	11		16	8	10		15	1	2		13	0	1
10	0	0		184	19	2		171	19	8		164	8	9		150	12	1		130	0	11
0	1	0	13	0	18	4	22	0	17	1	31	0	16	3	40	0	14	10	49	0	12	8
0	2	6		2	5	10		2	2	9		2	0	9		1	17	2		1	11	9
0	5	0		4	11	8		4	5	7		4	1	7		3	14	4		3	3	7
1	0	0		18	6	9		17	2	7		16	6	4		14	17	6		12	14	4
10	0	0		183	7	10		171	6	1		163	4	0		148	15	0		127	3	11
0	1	0	14	0	18	2	23	0	17	0	32	0	16	2	41	0	14	8	50	0	12	5
0	2	6		2	5	5		2	2	8		2	0	5		1	16	8		1	11	0
0	5	0		4	10	10		4	5	4		4	0	11		3	13	4		3	2	1
1	0	0		18	3	5		17	1	4		16	3	9		14	13	7		12	8	7
10	0	0		181	14	9		170	13	7		161	18	0		146	16	4		124	5	11
0	1	0	15	0	18	0	24	0	17	0	33	0	16	0	42	0	14	5	51	0	12	1
0	2	6		2	5	0		2	2	6		2	0	1		1	16	2		1	10	4
0	5	0		4	10	0		4	5	0		4	0	3		3	12	4		3	0	8
1	0	0		18	0	1		17	0	1		16	1	0		14	9	6		12	2	9
10	0	0		180	0	10		170	1	1		160	10	4		144	15	1		121	7	8
0	1	0	16	0	17	10	25	0	16	11	34	0	15	10	43	0	14	3	52	0	11	10
0	2	6		2	4	7		2	2	4		1	19	9		1	15	7		1	9	7
0	5	0		4	9	2		4	4	8		3	19	6		3	11	3		2	19	3
1	0	0		17	16	8		16	18	9		15	18	1		14	5	2		11	17	1
10	0	0		178	7	3		169	8	0		159	0	11		142	12	2		118	11	4
0	1	0	17	0	17	8	26	0	16	10	35	0	15	8	44	0	14	0	53	0	11	6
0	2	6		2	4	2		2	2	2		1	19	4		1	15	1		1	8	11
0	5	0		4	8	4		4	4	4		3	18	8		3	10	2		2	17	10
1	0	0		17	13	6		16	17	4		15	14	11		14	0	8		11	11	6
10	0	0		176	15	7		168	13	5		157	9	9		140	7	0		115	15	9
0	1	0	18	0	17	6	27	0	16	9	36	0	15	7	45	0	13	9	54	0	11	3
0	2	6		2	3	9		2	1	11		1	18	11		1	14	5		1	8	3
0	5	0		4	7	7		4	3	10		3	17	11		3	8	11		2	16	6
1	0	0		17	10	7		16	15	5		15	11	8		13	15	11		11	6	1
10	0	0		175	6	6		167	14	6		155	16	11		137	19	5		113	1	3

Amount of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.			Age.	Value of the Annuity.		
£	s.	d.		£	s.	d.		£	s.	d.		£	s.	d.		£	s.	d.		£	s.	d.
0	1	0	55	0	11	0	64	0	8	6	73	0	5	11	82	0	3	2	91	0	1	2
0	2	6		1	7	7		1	1	3		0	14	11		0	8	0		0	3	0
0	5	0		2	15	2		2	2	7		1	9	10		0	16	1		0	6	1
1	0	0		11	0	9		8	10	5		5	19	5		3	4	4		1	4	6
10	0	0		110	7	9		85	4	10		59	14	9		32	3	5		12	5	7
0	1	0	56	0	10	9	65	0	8	2	74	0	5	8	83	0	2	11	92	0	1	0
0	2	6		1	6	11		1	0	6		0	14	2		0	7	3		0	2	8
0	5	0		2	13	10		2	1	0		1	8	5		0	14	7		0	5	4
1	0	0		10	15	6		8	4	3		5	13	11		2	18	6		1	1	5
10	0	0		107	15	0		82	3	3		56	19	3		29	5	0		10	14	8
0	1	0	57	0	10	6	66	0	7	10	75	0	5	4	84	0	2	7	93	0	0	11
0	2	6		1	6	3		0	19	9		0	13	6		0	6	6		0	2	3
0	5	0		2	12	6		1	19	6		1	7	0		0	13	1		0	4	7
1	0	0		10	10	3		7	18	1		5	8	2		2	12	7		0	18	7
10	0	0		105	3	0		79	1	6		54	2	0		26	6	2		9	6	3
0	1	0	58	0	10	3	67	0	7	7	76	0	5	1	85	0	2	4	94	0	0	9
0	2	6		1	5	7		0	19	0		0	12	9		0	5	10		0	1	11
0	5	0		2	11	3		1	18	1		1	5	6		0	11	8		0	3	11
1	0	0		10	5	1		7	12	4		5	2	3		2	6	11		0	15	10
10	0	0		102	11	0		76	3	10		51	2	11		23	9	10		7	18	10
0	1	0	59	0	9	11	68	0	7	4	77	0	4	9	86	0	2	0	95	0	0	7
0	2	6		1	4	11		0	18	4		0	11	11		0	5	2		0	1	7
0	5	0		2	9	11		1	16	8		1	3	10		0	10	4		0	3	2
1	0	0		9	19	9		7	6	8		4	15	6		2	1	6		0	12	10
10	0	0		99	18	1		73	6	10		47	15	8		20	15	7		6	9	1
0	1	0	60	0	9	8	69	0	7	0	78	0	4	5	87	0	1	10	...	...		
0	2	6		1	4	3		0	17	7		0	11	1		0	4	7		...		
0	5	0		2	8	7		1	15	3		1	2	2		0	9	2		...		
1	0	0		9	14	4		7	1	0		4	8	10		1	16	10		...		
10	0	0		97	4	1		70	10	4		44	8	11		18	9	1		...		
0	1	0	61	0	9	5	70	0	6	9	79	0	4	1	88	0	1	7	...	...		
0	2	6		1	3	7		0	16	11		0	10	3		0	4	1		...		
0	5	0		2	7	2		1	13	10		1	0	7		0	8	2		...		
1	0	0		9	8	9		6	15	5		4	2	5		1	12	11		...		
10	0	0		94	7	6		67	14	10		41	4	11		16	9	9		...		
0	1	0	62	0	9	1	71	0	6	6	80	0	3	9	89	0	1	5	...	...		
0	2	6		1	2	10		0	16	3		0	9	6		0	3	8		...		
0	5	0		2	5	8		1	12	6		0	19	0		0	7	5		...		
1	0	0		9	2	9		6	10	0		3	16	2		1	9	8		...		
10	0	0		91	8	2		65	0	9		38	2	3		14	16	8		...		
0	1	0	63	0	8	9	72	0	6	2	81	0	3	6	90	0	1	4	...	...		
0	2	6		1	2	0		0	15	7		0	8	9		0	3	4		...		
0	5	0		2	4	1		1	11	2		0	17	6		0	6	8		...		
1	0	0		8	16	7		6	4	9		3	10	1		1	6	8		...		
10	0	0		88	6	7		62	7	11		35	1	5		13	6	10		...		

TABLE V.

FOR CALCULATING THE VALUE OF PROPERTY HELD FOR TERMS OF YEARS TO PAY INTEREST AT THE SEVERAL RATES OF 6, 7, AND 8 PER CENT.

Years Unexpired.	Years purchase to pay 6 per cent.	Years purchase to pay 7 per cent.	Years purchase to pay 8 per cent.	Years Unexpired.	Years purchase to pay 6 per cent.	Years purchase to pay 7 per cent.	Years purchase to pay 8 per cent.	Years Unexpired.	Years purchase to pay 6 per cent.	Years purchase to pay 7 per cent.	Years purchase to pay 8 per cent.
1	1	1	1	16	10	9½	8¾	31	14	12½	11¼
2	1⅞	1⅞	1¾	17	10⅛	9⅝	9	32	14	12⅝	11½
3	2¾	2⅞	2⅝	18	10⅜	10	9¼	33, 34	14¼	12¾	11⅝
4	3½	3½	3¼	19	11¼	10¼	9½	35, 36	14⅜	13	11¾
5	4¼	4	4	20	11½	10⅝	9¾	37	14¾	13	11¾
6	5	4⅞	4½	21	11¾	10¾	10	38	14¾	13¼	11¾
7	5½	5½	5¼	22	12	11	10¼	39, 40	15	13¼	12
8	6⅛	6	5¾	23	12¼	11¼	10⅜	41, 42, 43	15¼	13½	12
9	6⅝	6½	6¼	24	12½	11⅝	10½	44, 45	15⅜	13⅝	12
10	7¼	7	6¾	25	12¾	11⅝	10¾	46, 47	15¾	13⅝	12¼
11	8	7½	7¼	26	13	11¾	10¾	48 to 52	15¾	13¾	12¼
12	8⅛	8	7½	27	13¼	12	11	53 to 58	16	14	12¼
13	8⅝	8¼	8	28	13½	12¼	11	59	16¼	14	12¼
14	9¼	8¾	8¼	29	13½	12¼	11¼	60 to 69	16¼	14	12½
15	9¾	9	8½	30	13¾	12½	11¼	70 to 100	16⅜	14¼	12⅜
...	...	...	...	...	...	...	...	Perpetuity	16¾	14¼	12½

TABLE VI.

SHOWING THE DISCOUNT TO BE ALLOWED ON ANNUITY DUTY WHEN PAID IN ADVANCE.

Section 1.

Time paid after Death.			Discount per cent.	Time paid after Death.			Discount per cent.	Time paid after Death.			Discount per cent.
Yrs.	M'ths.	W'ks.		Yrs.	M'ths.	W'ks.		Yrs.	M'ths.	W'ks.	
			£ s. d.				£ s. d.				£ s. d.
...	...	Death	10 0 0	...	4	2	8 10 0	...	9	...	7 0 0
...	...	2	9 16 8	...	5	...	8 6 8	...	9	2	6 16 8
...	1	...	9 13 4	...	5	2	8 3 4	...	10	...	6 13 4
...	1	2	9 10 0	...	6	...	8 0 0	...	10	2	6 10 0
...	2	...	9 6 8	...	6	2	7 16 8	...	11	...	6 6 8
...	2	2	9 3 4	...	7	...	7 13 4	...	11	2	6 3 4
...	3	...	9 0 0	...	7	2	7 10 0	...	12	...	6 0 0
...	3	2	8 16 8	...	8	...	7 6 8	...	...	...	...
...	4	...	8 13 4	...	8	2	7 3 4	...	...	...	...

Section 2.

This Section contains columns Nos. 1, 2, and 3. If the first instalment of duty has been paid when due, and it be desired to discharge the remaining instalments, then the discount will be found in column No. 1; but if payment has been delayed, and it be wished to pay up the whole of the instalments, then the discount will be found in the 3rd column, the principle of the table being that interest on the overdue instalment is deducted from the discount allowable on the amount paid in advance.

Time paid after Death.			1. Discount to be allowed.	2. Interest to be deducted when Duty in Arrear.	3. Net Discount.	Time paid after Death.			1. Discount to be allowed.	2. Interest to be deducted when Duty in Arrear.	3. Net Discount.
Yrs.	M'ths.	W'ks.	£ s. d.	£ s. d.	£ s. d.	Yrs.	M'ths.	W'ks.	£ s. d.	£ s. d.	£ s. d.
1	...	...	6 0 0	0 0 0	6 0 0	1	9	2	3 12 6	0 15 10	2 16 8
1	...	2	5 17 6	0 0 10	5 16 8	1	10	...	3 10 0	0 16 8	2 13 4
1	1	...	5 15 0	0 1 8	5 13 4	1	10	2	3 7 6	0 17 6	2 10 0
1	1	2	5 12 6	0 2 6	5 10 0	1	11	...	3 5 0	0 18 4	2 6 8
1	2	...	5 10 0	0 3 4	5 6 8	1	11	2	3 2 6	0 19 2	2 3 4
1	2	2	5 7 6	0 4 2	5 3 4	2	...	...	3 0 0	1 0 0	2 0 0
1	3	...	5 5 0	0 5 0	5 0 0	2	...	2	2 18 4	1 1 8	1 16 8
1	3	2	5 2 6	0 5 10	4 16 8	2	1	...	2 16 8	1 3 4	1 13 4
1	4	...	5 0 0	0 6 8	4 13 4	2	1	2	2 15 0	1 5 0	1 10 0
1	4	2	4 17 6	0 7 6	4 10 0	2	2	...	2 13 4	1 6 8	1 6 8
1	5	...	4 15 0	0 8 4	4 6 8	2	2	2	2 11 8	1 8 4	1 3 4
1	5	2	4 12 6	0 9 2	4 3 4	2	3	...	2 10 0	1 10 0	1 0 0
1	6	...	4 10 0	0 10 0	4 0 0	2	3	2	2 8 4	1 11 8	0 16 8
1	6	2	4 7 6	0 10 10	3 16 8	2	4	...	2 6 8	1 13 4	0 13 4
1	7	...	4 5 0	0 11 8	3 13 4	2	4	2	2 5 0	1 15 0	0 10 0
1	7	2	4 2 6	0 12 6	3 10 0	2	5	...	2 3 4	1 16 8	0 6 8
1	8	...	4 0 0	0 13 4	3 6 8	2	5	2	2 1 8	1 18 4	0 3 4
1	8	2	3 17 6	0 14 2	3 3 4	2	6	...	2 0 0	2 0 0	0 0 0
1	9	...	3 15 0	0 15 0	3 0 0	...	...	...	...	...	...

Section 3.

By the preceding Section it will be seen that at two and a-half years after death, if the instalments had not been paid as they became due, the discount arrives at what we shall call the *vanishing point.* But assuming the instalments to have been punctually discharged, discount may be deducted up to the end of the four years, and this Section will show the proportion.

Period when paid after Death.			Discount per cent. to be allowed.	Period when paid after Death.			Discount per cent. to be allowed.	Period when paid after Death.			Discount per cent. to be allowed.
Yrs.	M'ths.	W'ks.	£ s. d.	Yrs.	M'ths.	W'ks.	£ s. d.	Yrs.	M'ths.	W'ks.	£ s. d.
2	6	2	1 18 4	3	...	2	0 19 2	3	6	2	0 9 2
2	7	...	1 16 8	3	1	...	0 18 4	3	7	...	0 8 4
2	7	2	1 15 0	3	1	2	0 17 6	3	7	2	0 7 6
2	8	...	1 13 4	3	2	...	0 16 8	3	8	...	0 6 8
2	8	2	1 11 8	3	2	2	0 15 10	3	8	2	0 5 10
2	9	...	1 10 0	3	3	...	0 15 0	3	9	...	0 5 0
2	9	2	1 8 4	3	3	2	0 14 2	3	9	2	0 4 2
2	10	...	1 6 8	3	4	...	0 13 4	3	10	...	0 3 4
2	10	2	1 5 0	3	4	2	0 12 6	3	10	2	0 2 6
2	11	...	1 3 4	3	5	...	0 11 8	3	11	...	0 1 8
2	11	2	1 1 8	3	5	2	0 10 10	3	11	2	0 0 10
3	...	...	1 0 0	3	6	...	0 10 0	4	...	...	0 0 0

Explanation.—One example here of the application of this and the next Table will suffice. Assume the instalments to have been paid when due, and at two years and two months after death it be desired to discharge all the unpaid duty, a reference to Section 2 will show that the discount amounts to £2, 13s. 4d., or $2\frac{2}{3}$ per cent. All the calculations can be made by *aliquot parts*. Now, suppose the *whole duty—not the instalment only then due*—to be £97, 10s. 6d., the calculation may be made as follows, or the *aliquot parts* may be used in such way as the calculator may deem most convenient :—

£97	10	6	
		2	13 4
£195	1	0	
32	10	2	$6/8 = \frac{1}{3}$
32	10	2	$6/8 = \frac{1}{3}$
£2·60	1	4	
	20		
s. 12·01			
	12		
d.·16 = $\frac{16}{100}$ of 1d. Equal to £2, 12s. $0\frac{16}{100}$d.			

Proof by ordinary method : Ten months interest on one instalment at £24, 7s. 8d. is £0 16 3
One year and ten months interest on the other instalment of the same amount is 1 15 9

£2 12 0

TABLE VII.

SHOWING THE DISCOUNT TO BE ALLOWED ON SUCCESSION DUTY WHEN PAID IN ADVANCE.

Section 1.

Period when paid after Death.			Discount per cent.	Period when paid after Death.			Discount per cent.	Period when paid after Death.			Discount per cent.
Years.	M'ths.	W'ks.		Years.	M'ths.	W'ks.		Years.	M'ths.	W'ks.	
			£ *s.* *d.*				£ *s.* *d.*				£ *s.* *d.*
Death	...	...	11 0 0	...	4	2	9 10 0	...	9	...	8 0 0
...	...	2	10 16 8	...	5	...	9 6 8	...	9	2	7 16 8
...	1	...	10 13 4	...	5	2	9 3 4	...	10	...	7 13 4
...	1	2	10 10 0	...	6	...	9 0 0	...	10	2	7 10 0
...	2	...	10 6 8	...	6	2	8 16 8	...	11	...	7 6 8
...	2	2	10 3 4	...	7	...	8 13 4	...	11	2	7 3 4
...	3	...	10 0 0	...	7	2	8 10 0	1	...	...	7 0 0
...	3	2	9 16 8	...	8	...	8 6 8	...	...	...	...
...	4	...	9 13 4	...	8	2	8 3 4	...	...	...	...

Section 2.

The ntroductory note to Section 2 of the Annuity Discount Table equally applies to this.

Period when paid after Death.			Dis-count per cent.			Interest on Instal-ments in arrear.			Net Dis-count.		
Yrs.	M'ths.	W'ks.	£	*s.*	*d.*	£	*s.*	*d.*	£	*s.*	*d.*
1	...	...	7	0	0	0	0	0	7	0	0
1	...	2	6	17	1	0	0	5	6	16	8
1	1	...	6	14	2	0	0	10	6	13	4
1	1	2	6	11	3	0	1	3	6	10	0
1	2	...	6	8	4	0	1	8	6	6	8
1	2	2	6	5	5	0	2	1	6	3	4
1	3	...	6	2	6	0	2	6	6	0	0
1	3	2	5	19	7	0	2	11	5	16	8
1	4	...	5	16	8	0	3	4	5	13	4
1	4	2	5	13	9	0	3	9	5	10	0
1	5	...	5	10	10	0	4	2	5	6	8
1	5	2	5	7	11	0	4	7	5	3	4
1	6	...	5	5	0	0	5	0	5	0	0
1	6	2	5	2	6	0	5	10	4	16	8
1	7	...	5	0	0	0	6	8	4	13	4
1	7	2	4	17	6	0	7	6	4	10	0
1	8	...	4	15	0	0	8	4	4	6	8
1	8	2	4	12	6	0	9	2	4	3	4
1	9	...	4	10	0	0	10	0	4	0	0
1	9	2	4	7	6	0	10	10	3	16	8
1	10	...	4	5	0	0	11	8	3	13	4
1	10	2	4	2	6	0	12	6	3	10	0

Period when paid after Death.			Dis-count per cent.			Interest on Instal-ments in arrear.			Net Dis-count.		
Yrs.	M'ths.	W'ks.	£	*s.*	*d.*	£	*s.*	*d.*	£	*s.*	*d.*
1	11	...	4	0	0	0	13	4	3	6	8
1	11	2	3	17	6	0	14	2	3	3	4
2	...	...	3	15	0	0	15	0	3	0	0
2	...	2	3	12	11	0	16	3	2	16	8
2	1	...	3	10	10	0	17	6	2	13	4
2	1	2	3	8	9	0	18	9	2	10	0
2	2	...	3	6	8	1	0	0	2	6	8
2	2	2	3	4	7	1	1	3	2	3	4
2	3	...	3	2	6	1	2	6	2	0	0
2	3	2	3	0	5	1	3	9	1	16	8
2	4	...	2	18	4	1	5	0	1	13	4
2	4	2	2	16	3	1	6	3	1	10	0
2	5	...	2	14	2	1	7	6	1	6	8
2	5	2	2	12	1	1	8	9	1	3	4
2	6	...	2	10	0	1	10	0	1	0	0
2	6	2	2	8	4	1	11	8	0	16	8
2	7	...	2	6	8	1	13	4	0	13	4
2	7	2	2	5	0	1	15	0	0	10	0
2	8	...	2	3	4	1	16	8	0	6	8
2	8	2	2	1	8	1	18	4	0	3	4
2	9	...	2	0	0	2	0	0	0	0	0
...	...	...		...			...			...	

Section 3.

See introductory note to Section 3 of the Annuity Discount Table.

Period when paid after death.			Dis-count per cent.			Period when paid after death.			Dis-count per cent.			Period paid when after death.			Dis-count per cent.		
Yrs.	M'ths.	W'ks.	£	*s.*	*d.*	Yrs.	M'ths.	W'ks.	£	*s.*	*d.*	Yrs.	M'ths.	W'ks.	£	*s.*	*d.*
2	9	2	1	18	4	3	4	2	0	18	9	3	11	2	0	5	10
2	10	...	1	16	8	3	5	...	0	17	6	4	...	...	0	5	0
2	10	2	1	15	0	3	5	2	0	16	3	4	...	2	0	4	7
2	11	...	1	13	4	3	6	...	0	15	0	4	1	...	0	4	2
2	11	2	1	11	8	3	6	2	0	14	2	4	1	2	0	3	9
3	...	...	1	10	0	3	7	...	0	13	4	4	2	...	0	3	4
3	...	2	1	8	9	3	7	2	0	13	0	4	2	2	0	2	11
3	1	...	1	7	6	3	8	...	0	11	8	4	3	...	0	2	6
3	1	2	1	6	3	3	8	2	0	10	10	4	3	2	0	2	1
3	2	...	1	5	0	3	9	...	0	10	0	4	4	...	0	1	8
3	2	2	1	3	9	3	9	2	0	9	2	4	4	2	0	1	3
3	3	...	1	2	6	3	10	...	0	8	4	4	5	...	0	0	10
3	3	2	1	1	3	3	10	2	0	7	6	4	5	2	0	0	5
3	4	...	1	0	0	3	11	...	0	6	8	4	6	...	0	0	0

XXXVII.—16 & 17 *Vict. c.* 59.—[*4th August*, 1853.](*a*)

CHARGES (§ 8) additional inventories with additional duty only.

XXXVIII.—22 & 23 *Vict. c.* 36.—[*13th August*, 1859.](*b*)

EXTENDS (§ 1) the graduated scales of inventory duty.

XXXIX.—23 *Vict. c.* 5.—[*23rd March*, 1860.]

MAKES (§ 1) enfaced Indian Government securities *bona notabilia* in England and Scotland.

XL.—23 *Vict. c.* 15.—[*3rd April*, 1860.]

CHARGES (§§ 4, 5, 6) inventory duty upon personal property appointed under a power, and upon heritable securities in Scotland.

The application of § 6 of this Act repealed as regards England by § 9 of the Act to be here next noticed.

XLI. 23 & 24 *Vict. c.* 80.—[*6th August*, 1860.](*c*)

PROVIDES to the following effect:—

That (§ 1) money secured on heritable property in Scotland and Scottish bonds excluding executors shall be liable to inventory duty.

That (§ 2) the duty and interest thereon shall be payable by the person who takes the secured money.

That (§ 3) a stamped special inventory of such money shall be lodged within six months at the Inland Revenue Office in Edinburgh.

That (§ 4) such money may be added to the inventory of the

(*a*) The whole of this Act repealed by 33 & 34 Vict. c. 99 (1870), except §§ 8, 17, 19, and 20; and also § 20, so far as it contains any enactment thereby repealed.

(*b*) § 2 of this Act repealed by 38 & 39 Vict. c. 96 (1875).

(*c*) § 9 of this Act repealed by 38 & 39 Vict. c. 96 (1875).

personal or moveable estate, and that the duty paid on the aggregate amount shall be ultimately borne by the parties according to their beneficial interest.

That (§ 5) the property for payment of the inventory duty shall be valued as at the date of the affidavit to the inventory.

That (§ 6) the Commissioners of Inland Revenue may grant a return of duty within three years if satisfied a return should be made.

That (§ 7) intromitters shall be held to have taken the money secured.

That (§ 8) money secured on land by absolute conveyance or by adjudication or otherwise shall fall under the provisions of the Act.

That (§ 9) § 6 of 23 Vict. c. 15 be repealed as regards England and Ireland.

The Act gives a form of "Special Inventory."

XLII.—24 & 25 *Vict. c.* 92.—[28*th June*, 1861.]

Prevents (§ 3) a return of inventory duty in respect of "any voluntary debt due from any person dying after 28th June, 1861, which shall be expressed to be payable on the death of such person, or payable under any instrument which shall not have been *bonâ fide* delivered to the donee thereof three months before the death of such person."

XLIII.—27 & 28 *Vict. c.* 56.—[29*th July*, 1864.](*d*)

Declares (§§ 4 and 5) the liability of British ships at sea to inventory duty; and exempts from stamp duty where the estate and effects do not exceed £100.

XLIV.—31 & 32 *Vict. c.* 124.—[31*st July*, 1868.](*e*)

Provides (§§ 7 and 8) for mortgage debts on leasehold estates in England or Ireland; and (§ 9) for interest at 4 per cent. being paid on arrears of legacy and succession duties.

(*d*) §§ 2, 3, 16, and 17 of this Act repealed by 33 & 34 Vict. c. 99 (1870); and § 6, so far as it relates to dealers in plate; also § 9, and practically § 10, repealed by 38 & 39 Vict. c. 96 (1875).

(*e*) §§ 10, 11, and 12 repealed by 33 & 34 Vict. c. 99 (1870).

XLV.—*ACT to grant certain Duties of Customs and Inland Revenue, to alter other Duties, and to Amend the Laws relating to Inland Revenue,* 43 *Vict. c.* 14.—[24*th March,* 1880.]

PART I.—*Customs.* PART II.—*Taxes.*

PART III.—*Stamps.*

IX. *Grant of duties on probates and letters of administration.*—On and after the first day of April one thousand eight hundred and eighty, in lieu of the stamp duties now payable(*a*) upon probates of wills and letters of administration in England and Ireland, and upon inventories to be exhibited and recorded in any commissary-court in Scotland, there shall be charged and paid the duties specified in the schedule to this Act: Provided that an additional inventory to be so exhibited or recorded of any effects of a deceased person, where a former duly stamped inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of April one thousand eight hundred and eighty, shall be chargeable with the amount of stamp duty with which it would have been chargeable if this Act had not been passed.

X. *Account to accompany affidavit on application for probate or letters of administration.*—(1.) Together with the affidavit(*b*) to be required and received from the person applying for a probate or letters of administration *in England,* in conformity with section thirty-eight of the Act passed in the fifty-fifth year of the reign of King George the Third, chapter one hundred and eighty-four, there shall be delivered an account of the particulars of the personal estate for or in respect of which the probate or letters of administration is or are to be granted, and of the estimated value of such particulars.

(2.) The account so delivered shall be transmitted to the Commissioners of Inland Revenue, together with the documents mentioned in section ninety-three of the Act passed in the twentieth and twenty-first years of Her Majesty's reign, chapter seventy-seven.

(3.) A like account shall be annexed to the affidavit to be required and received from the person applying for a probate or letters of

(*a*) The stamp duties in Scotland are imposed by 55 Geo. III. c. 184 as modified by 22 & 23 Vict. c. 36, § 1, and 27 & 28 Vict. c. 56, § 5 *supra.* The duties imposed by the present Act operate merely from 1st April, 1880, to 1st June, 1880. The former duties are in force down to the former date, and from the latter date the Act 44 Vict. c. 12 (*infra*) comes into operation.

(*b*) The affidavit must now verify the account.—44 Vict. c. 12, § 29.

administration in Ireland, in conformity with section one hundred and seventeen of the Act passed in the fifty-sixth year of the reign of King George the Third, chapter fifty-six, and such account shall be in lieu of, and in substitution for, the account annexed to the form of affidavit set forth in Part III. of the schedule to the said Act.

(4.) Every account to be delivered in pursuance of this section shall be in accordance with such form as may be prescribed by the Commissioners of Her Majesty's Treasury.

XI. *Power to commute legacy duty or succession duty presumptively payable in certain cases.*—Where any legacy duty or succession duty shall be presumptively payable in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in a legacy, or residue, or in personal property comprised in a succession, and the duty (if any) payable upon the life or other temporary interest shall have been fully paid and satisfied, it shall be lawful for the Commissioners of Inland Revenue, in their discretion, upon the application of the executor or trustee or other person who would be accountable for the duty in respect of such interest in expectancy, if it were then in possession, to commute the duty presumptively payable for a certain sum to be presently paid.

For assessing the amount which shall be so payable the Commissioners shall cause a present value to be set upon the presumptive duty, regard being had to any contingencies affecting the liability to such duty, and the interest of money involved in the calculation being reckoned at the rate for the time being allowed by the Commissioners in respect of duties paid in advance under the Succession Duty Act, 1853 [16 & 17 Vict. c 51].

Upon the receipt of the certain sum the Commissioners shall give a discharge for the duty accordingly.(*c*)

XII. *Discharge of executor, &c., from claim to duty on distribution of fund.*—When an executor, administrator, or trustee shall have given notice in writing to the Commissioners of Inland Revenue for any claim to legacy duty or succession duty in respect of any fund in his hands which he intends to distribute, and shall have delivered to the Commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the Commissioners, and shall be entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund.

(*c*) See supplemental provision in § 43 of 44 Vict. c. 12, *infra*.

Such certificate shall not in any way affect the liability of any person other than the person in whose favour it is expressed to be given.

XIII. *Relief from legacy duty when whole personal estate is less than* £100.—Where it appears upon an examination of the account rendered to the Commissioners of Inland Revenue that the value of the whole of the personal estate(*d*) of any person dying after the passing of this Act does not amount to the sum of one hundred pounds, no legacy duty shall be charged(*e*) in respect thereof or of any portion thereof.(*f*)

SCHEDULE of STAMP DUTIES on Probate and Letters of Administration in England or Ireland, and on Inventories in Scotland, on Estates of Persons dying between 1st April, 1880, and 1st June, 1881.

Where the estate and effects for or in respect of which a Probate or Letters of Administration shall be granted, or whereof an Inventory shall be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person and not beneficially, shall be :—

Estates.	Duty.	Estates.	Duty.
Above £100 and under £200	£2	Of the value of—	
Of the value of—		£35,000 and under £40,000	£940
£200 and under 300	4	40,000 „ 45,000	1,065
300 „ 400	6	45,000 „ 50,000	1,190
400 „ 500	9	50,000 „ 60,000	1,375
500 „ 600	11	60,000 „ 70,000	1,625
600 „ 800	15	70,000 „ 80,000	1,875
800 „ 1,000	22	80,000 „ 90,000	2,125
1,000 „ 1,500	30	90,000 „ 100,000	2,375
1,500 „ 2,000	40	100,000 „ 120,000	2,750
2,000 „ 3,000	62	120,000 „ 140,000	3,250
3,000 „ 4,000	88	140,000 „ 160,000	3,750
4,000 „ 5,000	113	160,000 „ 180,000	4,250
5,000 „ 6,000	140	180,000 „ 200,000	4,750
6,000 „ 7,000	165	200,000 „ 250,000	5,625
7,000 „ 8,000	190	250,000 „ 300,000	6,875
8,000 „ 9,000	215	300,000 „ 350,000	8,125
9,000 „ 10,000	240	350,000 „ 400,000	9,375
10,000 „ 12,000	275	400,000 „ 500,000	11,250
12,000 „ 14,000	325	500,000 and upwards then, in addition to the said duty of £11,250, for every full sum of £100,000 in excess of £500,000, and also for any fractional part of £100,000 so in excess, ...	2,500
14,000 „ 16,000	375		
16,000 „ 18,000	425		
18,000 „ 20,000	475		
20,000 „ 25,000	565		
25,000 „ 30,000	690		
30,000 „ 35,000	815		

(*d*) This means gross estate.

(*e*) Where the person dies *after* 24th March, 1880.

(*f*) See supplemental provision in § 36 of 44 Vict. c. 12, *infra*.

XLVI.—*ACT to grant certain Duties of Customs and Inland Revenue, to alter other Duties, and to amend the Laws relating to Customs and Inland Revenue,* 44 *Vict. c.* 12.—[3*rd June,* 1881.]

PART I.—*Customs and Excise.* PART II.—*Taxes.*

PART III.—*Stamps.*

As to Probate and Legacy Duties, and Duties on Accounts.

XXVI. *Stamp duties to be under the care and management of the Commissioners of Inland Revenue.*—(1.) The stamp duties hereinafter imposed shall be under the care and management of the Commissioners of Inland Revenue, who by themselves and their officers shall have the same powers and authorities for the collection, recovery, and management thereof as are by law vested in them for the collection, recovery, and management of any stamp duties, and shall have all other powers and authorities requisite for carrying into effect the provisions of this Act in relation to such stamp duties.

(2.) Such stamp duties may be denoted by impressed or adhesive stamps, or partly by impressed stamps(*g*) and partly by adhesive stamps, as the said Commissioners may think proper.

(3.) As respects the duties imposed on affidavits in substitution for the duties on probates or letters of administration, the several provisions now in force(*h*) in relation to the last-mentioned duties shall, so far as the same are consistent with the provisions of this Act, be deemed to be applicable to the said duties hereby imposed, and in the application thereof a probate or letters of administration having thereon such a certificate as is hereinafter mentioned shall for all purposes be deemed to have been duly stamped in respect of the value stated in the certificate.

XXVII. *Grant of duties in respect of probate and letters of administration and on inventories.*—The duties imposed by the Customs and Inland Revenue Act, 1880, upon probates of wills and letters of administration in *England and Ireland* shall not be payable upon probates or letters of administration granted on and after the first day of June, one thousand eight hundred and eighty one; and on and after that day, in substitution for such duties, and in lieu of the duties imposed by the said Act upon *inventories in Scotland*,

(*g*) The Commissioners have arranged for the use of certain adhesive stamps under this section, but it is understood that the arrangement does not extend to Scotland.

(*h*) These provisions include those in § 37 and following sections of 55 Geo. III. c. 184 *supra*, subject to the modification introduced by §§ 31 and 32 of this Act.

there shall, save as is hereinafter expressly provided(*i*), be charged and paid on the affidavit to be required and received from the person applying for the probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland, the stamp duties hereinafter specified; (that is to say)—

	Duty.
Where the estate and effects(*k*) for or in respect of which the probate or letters of administration is or are to be granted, or whereof the inventory is to be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as trustee, and not beneficially, shall be above the value of £100(*l*), and not above the value of £500, ...	At the rate of one pound for every full sum of £50, and for any fractional part of £50 over any multiple of £50:
Where such estate and effects shall be above the value of £500, and not above the value £1000, . . .	At the rate of one pound five shillings for every full sum of £50, and for any fractional part of £50 over any multiple of £50:
Where such estate and effects shall be above the value of £1000, . .	At the rate of three pounds for every full sum of £100, and for any fractional part of £100 over any multiple of £100:

(*i*) See §§ 34 to 36 of this Act.

(*k*) As to the property to be included in an inventory, see § 153 *supra*.

(*l*) Estates under £100 in value exempted from duty by 27 & 28 Vict. c. 56, § 5, and exemption since continued, although not expressly provided for. The exemption applies where the estate is reduced by debts under the above amount. See the following section.

Provided that an additional inventory, to be exhibited or recorded in Scotland, of any effects of a deceased person, where a former inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of June, one thousand eight hundred and eighty-one, shall be chargeable with the amount of stamp duty with which it would have been chargeable if this Act had not been passed.

XXVIII. *Power to deduct debts and funeral expenses where deceased died domiciled in the United Kingdom*(*m*).—On and after the first day of June, one thousand eight hundred and eighty-one, in the case of a person dying domiciled in any part of the United Kingdom, it shall be lawful for the person applying for the probate or letters of administration in England or Ireland, or exhibiting the inventory in Scotland, to state in his affidavit the fact of such domicile, and to deliver therewith or annex thereto a schedule of the debts due from the deceased to persons resident in the United Kingdom, and the funeral expenses, and in that case, for the purpose of the charge of duty on the affidavit or inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule shall be deducted from the value of the estate and effects as specified in the account, delivered with or annexed to the affidavit, or whereof the inventory shall be exhibited.

Debts to be deducted under the power hereby given shall be debts due and owing from the deceased, and payable by law out of any part of the estate and effects comprised in the affidavit or inventory, and are not to include voluntary debts(*n*) expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been *bonâ fide* delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable, or a reimbursement may be capable of being claimed from any real estate of the deceased, or from any other estate or person.

Funeral expenses to be deducted under the power hereby given shall include only such expenses as are allowable as reasonable funeral expenses according to law.(*o*)

XXIX. *As to forms of affidavit.*—The affidavit to be required or received from any person applying for probate or letters of adminis-

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(*m*) Where debts cannot be deducted in first instance, a return of stamp duty may be applied for under the provisions of 5 & 6 Vict. c. 79, § 23 *supra*.

(*n*) The term "voluntary debts" is here used in the sense of gratuitous, to describe debts not contracted in consideration of marriage, or of money or money's worth.—Hanson, p. 29.

(*o*) See § 155 *supra*.

tration in *England or Ireland* shall extend to the verification of the account of the estate and effects, or to the verification of such account and the schedule of debts and funeral expenses, as the case may be, and shall be in accordance with such form as may be prescribed by the Commissioners of Her Majesty's Treasury; and the Commissioners of Inland Revenue shall provide forms of affidavit stamped to denote the duties payable under this Act.

XXX. *Probate or letters of administration to bear a certificate in lieu of stamp duty.*—No probate or letters of administration shall be granted by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, or by the Probate and Matrimonial Division of the High Court of Justice in Ireland, unless the same bear a certificate in writing under the hand of the proper officer of the court, showing that the affidavit for the Commissioners of Inland Revenue has been delivered, and that such affidavit, if liable to stamp duty, was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account.

XXXI. *Provision for return of duty overpaid.*—If at any time after the grant of probate or letters of administration, and during the administration of the estate, the value mentioned in the certificate of the officer of the court shall be found to exceed the true value of the personal estate and effects of the deceased, or if at any time within three years after the grant (*p*), or within such further period as the Commissioners of Inland Revenue may allow, it shall appear that no amount or an insufficient amount was deducted on account of debts and funeral expenses, it shall be lawful for the said Commissioners, upon proof of the facts to their satisfaction, to return the amount of stamp duty which shall have been overpaid, and to cause a certificate to be written by an authorised officer on the probate or letters of administration setting forth such true value, or, as the case may be, the amount, or corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the court.

XXXII. *Provision for payment of further duty.*—If at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall, within six months after the discovery(*q*), deliver a further affidavit with an account to the Commissioners of

(*p*) This is the time allowed by 5 & 6 Vict. c. 79, § 23, *supra*.

(*q*) See § 40 of this Act for penalty on failure to comply with this provision.

Inland Revenue, duly stamped for the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the said Commissioners interest upon such amount at the rate of five pounds per centum per annum from the date of the grant, or from such subsequent date as the said Commissioners may in the circumstances think proper.

The Commissioners of Inland Revenue, upon the receipt of such affidavit duly stamped as aforesaid, shall cause a certificate to be written by an authorised officer on the probate or letters of administration setting forth the true value of the estate and effects as then ascertained, or, as the case may be, the corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the court.

XXXIII. *Provisions as to obtaining probate, &c., where gross value of estate does not exceed* £300.—(1.) Where the whole personal estate and effects of any person dying on or after the first day of June, one thousand eight hundred and eighty-one (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty(*r*), and any personal estate and effects situate out of the United Kingdom), without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, it shall be lawful for the person intending to apply for probate or letters of administration in England or Ireland to deliver to the proper officer of the court, or to any officer of Inland Revenue duly appointed for the purpose, a notice in writing in the prescribed form, setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with him the sum of fifteen shillings for fees of court and expenses, and also, in case the estate and effects shall exceed the value of one hundred pounds(*s*), the further sum of thirty shillings for stamp duty.

(2.) If the officer has good reason to believe that the whole personal estate and effects of the deceased exceeds the value of three hundred pounds, he shall refuse to accept the notice and deposit until he is satisfied of the true value thereof.

(3.) The principal registrars of the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, and of the

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(*r*) These words refer to the property chargeable with duty by 23 Vict. c. 15, 4, *supra*.

(*s*) See 38 & 39 Vict. c. 41; 39 & 40 Vict. c. 24; and 39 & 40 Vict. c. 70; also § 171 *supra*.

Probate and Matrimonial Division of the High Court of Justice in Ireland, in communication with the Commissioners of Inland Revenue, shall prescribe the form of notice, and make such regulations as may be necessary with respect to the transmission of notices by officers of Inland Revenue, the steps to be taken for the preparation and filling up of forms and documents, and generally all matters which may be necessary, so as to authorise the grant of probate or letters of administration.

(4.) Officers of Inland Revenue are hereby empowered to administer all necessary oaths or affirmations, and in the case of letters of administration, to attest the bond and accept the same on behalf of the president or judge of the division.

(5.) Where the estate and effects shall exceed the value of one hundred pounds, the stamp duty payable on the affidavit for the Commissioners of Inland Revenue shall be the fixed duty of thirty shillings, and no more.

XXXIV. *Provision as to inventories where gross value of estate does not exceed* £300.—(1.) The Intestates, Widows, and Children (Scotland) Act, 1875, and the Small Testate Estate (Scotland) Act, 1876 [39 & 40 Vict. c. 24], as amended by the Sheriffs Court (Scotland) Act, 1876 [39 & 40 Vict. c. 70], shall be extended so as to apply to any case where the whole personal estate and effects of a person dying on or after the first day of June, one thousand eight hundred and eighty-one, without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, whoever may be the applicant for representation, and wheresoever the deceased may have been domiciled at the time of death, and the fees payable under Schedule (C) of each of the two first-mentioned Acts shall not exceed the sum of fifteen shillings, inclusive of the fee of two shillings and sixpence, to be paid to the commissary-clerk, or sheriff-clerk.

(2.) In any such case where the estate and effects shall exceed the value of one hundred pounds, the stamp duty payable on the inventory shall be the fixed duty of thirty shillings, and no more.

XXXV. *Provision in case of subsequent discovery that the value of estate exceeded* £300.—Where representation has been obtained in conformity with either of the two preceding sections, and it shall be at any time afterwards discovered that the whole personal estate and effects of the deceased were of a value exceeding three hundred pounds, then a sum equal to the stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to Her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief

afforded by the next succeeding section be claimed or allowed by reason of the deposit or payment of any sum.

XXXVI. *Relief from legacy duty in cases under* £300.—The payment of the sum of thirty shillings for the fixed duty on the affidavit or inventory in conformity with this Act shall be deemed to be in full satisfaction of any claim to legacy duty or succession duty in respect of the estate or effects to which such affidavit or inventory relates.

XXXVII. *Power to Commissioners to require explanations and proof in support of affidavit or inventory.*—It shall be lawful for the Commissioners of Inland Revenue at any time and from time to time within three years after the grant of probate or letters of administration or recording of inventory, as they may think necessary, to require the person acting in the administration of the estate and effects of any deceased person, to furnish such explanations, and to produce such documentary or other evidence respecting the contents of, or particulars verified by, the affidavit or inventory as the case may seem to them to require.

XXXVIII. *Grant of duties on accounts of certain property.*—(1.) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

(2.) The personal or moveable property to be included in an account shall be property of the following descriptions, viz.(*t*) :—

(*a*) Any property taken as a *donatio mortis causa* made by any person dying on or after the first day of June, one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made three months before the death of the deceased.

(*b*) Any property which a person dying on or after such day, having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause, to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

(*t*) Property specified in this section not exceeding £100 in value appears to be exempt from duty, but the provisions in § 33 of this Act do not apply to that property.

(*c*) Any property passing under any past or future voluntary settlement made by any person dying on or after such day, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim, the absolute interest in such property.

(3.) Where an account delivered duly stamped comprises property passing under a voluntary settlement, and, upon the production of the settlement, it shall appear that the stamp duty of five shillings per centum has been paid thereon according to the amount or value of the property so passing, or any part thereof, the amount of such stamp duty shall be returned to the person delivering the account.

XXXIX. *Delivery of accounts on oath.*—Every person who, as beneficiary, trustee, or otherwise, acquires possession, or assumes the management, of any personal or moveable property of a description to be included in an account(*u*) according to the preceding section, shall, upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased, deliver to the Commissioners of Inland Revenue a full and true account, verified by oath, of such property duly stamped as required by this Act. Any officer authorised by the Commissioners for the purpose may administer the oath.

XL. *Double duty payable in case of default.*—If any person who ought to obtain probate or letters of administration or deliver a further affidavit, or to exhibit an inventory, or who is required to deliver such account as aforesaid, shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to Her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy or succession duties.(*v*)

XLI. *Cesser of legacy and succession duties at the rate of one per cent. in certain cases.*—In respect of any legacy, residue, or share of residue payable out of, or consisting of, any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of one pound per centum imposed by the Act of the fifty-fifth

(*u*) No account need be delivered when the property is not above £100 in value.
(*v*) This section applies to intromitters without a title.

year of King George the Third, chapter one hundred and eighty-four, shall not be payable.(*w*)

And in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty at the rate of one pound per centum imposed by the Succession Duty Act, 1853 [16 & 17 Vict. c. 51], shall not be payable.(*x*)

XLII. *Charge of legacy duty on legacies not amounting to* £20.—Subject to the relief from legacy duty given by section thirteen of the Customs and Inland Revenue Act, 1880, every pecuniary legacy or residue or share of residue under the will or the intestacy of a person dying on or after the first day of June, one thousand eight hundred and eighty-one, although not of an amount or value of twenty pounds, shall be chargeable to the duties imposed by the said Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four, as modified by this Act.(*y*)

XLIII. *Power to Commissioners to accept composition for legacy duty under a will.*—It shall be lawful for the Commissioners of Inland Revenue, upon the application of the person acting in the execution of the will of any deceased person, and upon the delivery to them of an account showing the amount of the estate and effects in respect whereof legacy duty is payable, together with the names or description of class of the persons entitled thereto and every part thereof, in possession or expectancy, and their degrees of consanguinity to the testator, to assess the duty upon the amount shown by the said account at such a sum by way of composition as, having regard to the circumstances, shall appear to be proper, and to accept payment of the duty so assessed in full discharge of all claims for legacy duty under such will.

If the Commissioners are of opinion that an application should receive the assent of any person, they shall refuse to entertain the application until such assent shall have been given.

(*w*) The exemption in this branch extends only to the duties payable under the will or intestacy of the deceased.

(*x*) This exemption applies to property of a mixed character. The one per cent. duty will apparently still apply to property not comprised in an affidavit, such as foreign personal property, or the proceeds of heritable estate directed by will to be sold.

(*y*) The duty here affects only pecuniary legacies.

XLVII.—*ACT OF SEDERUNT to secure Payment of Legacy Duty and Succession Duty chargeable on Funds and Property* in manibus Curiæ.—[1*st March*, 1878.]

Whereas by the 25th section of the statute 36 Geo. III. c. 52, entitled "An Act for repealing certain duties on Legacies and Shares of Personal Estates, and for granting other duties thereon in certain cases," it is enacted "That if any suit shall be instituted concerning the administration of the personal estate of any person dying testate or intestate, or any part of such estate in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the court wherein such suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and in taking any account of any personal estate, or otherwise acting concerning the same, such court shall take care that no allowance shall be made in respect of any legacy, or part of legacy, or of any residue or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed."

And whereas by the 53rd section of the statute 16 & 17 Vict. c. 51, entitled "An Act for granting to Her Majesty Duties on Succession to Property, and for altering certain provisions of the Acts charging duties on legacies and shares of personal estates," it is enacted that "Whenever any suit shall be pending in any court for the administration of any property chargeable with duty under this Act, or the Legacy Duty Acts, such court shall provide, out of any property which may be in the possession or control of the court, for the payment of duty to the Commissioners" of Inland Revenue.

The Lords enact and ordain as follows:—

I. No decree, warrant, or order for payment of any money, consigned to abide the orders of the court, and forming part of the estate of any person deceased, shall be made in favour of any legatee or other person, entitled thereto by and through the testamentary writings of the said deceased person, or by and through his or her decease, until the duties chargeable thereon by the Acts imposing legacy duty and succession duty shall have been paid out of the same, or otherwise accounted for to the proper officer in the department of Inland Revenue: Provided always that when a motion is made for any such decree, warrant, or order, the Lord Ordinary or the Court may appoint the agent of the party making the motion, or failing him another enrolled law-agent, to settle with the officer of Inland Revenue the account of duties chargeable on the consigned

money belonging to such party; and when the account is so settled, the Lord Ordinary or the Court shall order payment to be made out of such consigned money to the officer of Inland Revenue of the amount of such duties, and to such agent of his reasonable charges for settling the said account, before any decree, warrant, or order is made in favour of such party.

II. No decree or order for the conveyance or transference of any property, whether heritable or moveable, chargeable with duty under the said Acts, shall be pronounced or issued, until provision has been made for the payment of such duty out of the said property, or until the said duty has been otherwise accounted for to the proper officer in the Department of Inland Revenue: Provided always, that when a motion is made for any such decree or order, the Lord Ordinary or the Court may appoint the agent of the party making such motion, or failing him another enrolled law-agent, to settle with the officer of Inland Revenue the account of duties chargeable on such property; and when the account is so settled, the Lord Ordinary or the Court shall make an order for payment to the officer of Inland Revenue of the amount of such duties, and to such agent of his reasonable charges for settling the said account; and in any decree or order to be thereafter pronounced or issued in favour of the party, the Lord Ordinary or the Court shall supersede extract till such payments shall have been made.

III. The clerks of court shall not present for the signature of the Lord Ordinary or the Court any such decree, warrant, or order as aforesaid, without the provisions of this Act of Sederunt and of the said Acts having been first complied with.

And the Lords appoint this Act to be inserted in the books of sederunt, and to be published in common form.

JOHN INGLIS, *I.P.D.*

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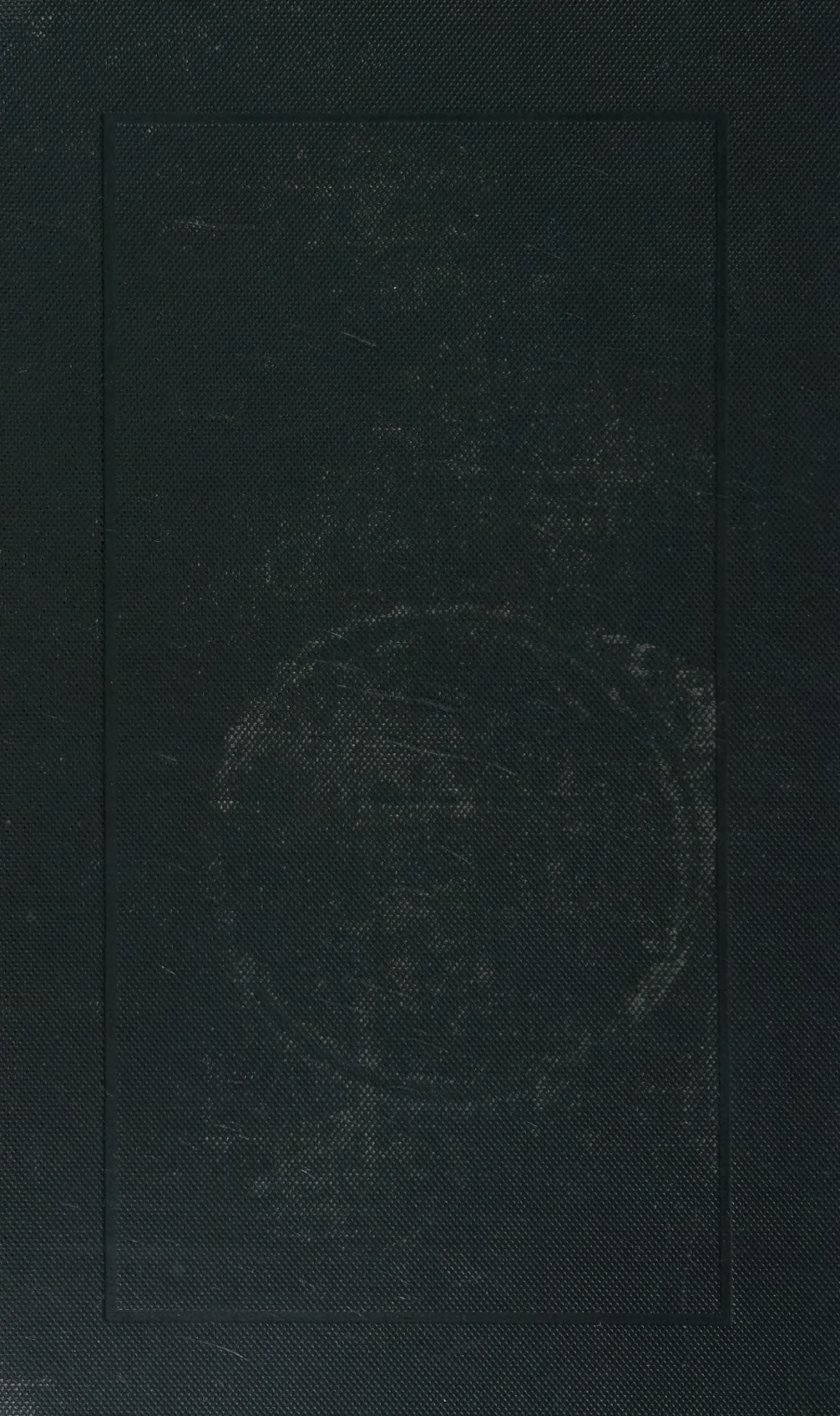
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